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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 74-730

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, AND CYNTHIA KOONCE MILLER, *Appellants*,

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, Governor; LOUIS L. GOLDSTEIN, Comptroller; JOHN A. LUETKEMEYER, Treasurer; COLLEGE OF NOTRE DAME; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE; and THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE OF THE CITY OF BALTIMORE, INC., *Appellees*.

On Appeal from a Three Judge United States District Court for the District of Maryland

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BRIEF OF APPELLEES LOYOLA COLLEGE AND MOUNT SAINT MARY'S COLLEGE

OPINION BELOW

The opinion of the United States District Court for the District of Maryland in this case is reported at 387 F. Supp. 1282 (1974). It is reprinted in full beginning at page A-1 of the Appendix to the Jurisdictional Statement (J.S.).

JURISDICTION

The District Court entered judgment in this case on October 21, 1974. J.S., p. A-57. Notice of appeal was filed with the District Court on October 25, 1974. J.S., p. A-59. This Court noted probable jurisdiction on February 18, 1975. —— U.S. ——. The jurisdiction of this Court to hear this case on direct appeal rests on 28 U.S. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

This appeal draws into question the constitutionality of Sections 65-69 of Article 77A of the Maryland Code, which is a program of public aid to private colleges and universities in Maryland. The statute, as originally enacted, is reprinted at pages 12 to 15 of the Joint Appendix (J.A.). The statute, as subsequently amended and in the form it existed at the time the District Court entered judgment, is reprinted at pages A-52 to A-54 of the Jurisdictional Statement.

QUESTIONS PRESENTED

1. Whether the Maryland college aid program challenged by the appellants has generated a primary effect that either advances or inhibits religion and thus violates the Establishment Clause of the First Amendment, as applied to the states through the Fourteenth Amendment.

2. Whether the administration of the Maryland college aid program results in excessive government entanglement with religion and thus violates the Establishment Clause of the First Amendment, as applied to the states through the Fourteenth Amendment.

3. Whether, if the Maryland college aid program is unconstitutional, the appellee colleges should be required to pay back the funds awarded and paid to them during a period when the program had been declared constitutional.

STATEMENT OF THE CASE

A. The Challenged Statute

In 1971, the Maryland General Assembly enacted a program of public aid to private colleges and universities in the state to help alleviate the growing financial problems shared by those schools with private institutions of higher learning throughout the nation. Md. Code, Art. 77A, § § 65-69. As the District Court noted in its opinion, the formula by which funds appropriated under the aid program have been allocated among private colleges and universities in the state has been

altered since the statute's enactment. J.S., pp. A-5 to A-6.[1] Throughout its existence however, the aid program has been designed to provide general purpose grants to institutions that meet statutory eligibility requirements. In 1972, at its first session following this Court's decision in *Tilton* v. *Richardson,* 403 U.S. 672 (1971), the Maryland General Assembly amended the statute to prohibit colleges receiving funds under the program from using those funds for "sectarian purposes." Md. Code, Art. 77A, § 68A.

To qualify for aid under the program, a college must (1) be nonprofit and accredited by the Maryland Department of Education, (2) have been in existence prior to July 1, 1970, (3) maintain one or more earned degree programs culminating in an associate in arts or baccalaureate degree, and (4) not award only seminarian or theological degrees. Md. Code, Art. 77A, § 66. The aid program is jointly administered by the appellee Board of Public Works and the Maryland Council for Higher Education ("Maryland Council"). Md. Code, Art. 77A, § 68. The Board of Public Works is the agency responsible for approving awards of state funds under the statute. The Maryland Council handles the routine administrative duties connected with the aid program.

The Maryland Council was created by statute and charged with the responsibility for the overall coordina-

[1] As originally enacted, the statute provided for an annual grant of $500 for each bachelor's degree and $200 for each associate in arts degree awarded by eligible colleges. J.A. 13. The statute was subsequently amended to provide that an institution's annual grant should be computed by multiplying the number of its full-time equivalent students by 15 percent of the amount appropriated for each full-time equivalent student attending four-year public colleges in Maryland. J.S., pp. A-53 to A-54.

tion of higher education in Maryland to assure an adequate allocation of educational resources. Md. Code, Art. 77A, §§ 28-32. While its statutory duties are defined specifically with reference to public higher education, the Maryland Council has collected extensive information about private colleges and universities in the state and has reported on the programs and practices of those institutions. As the court below noted, the Maryland Council has "developed considerable expertise as to the character and functions of the various private colleges and universities in the State, independent of its functions as administrator of this program." J.S., p. A-5.

The Maryland Council engages in a two-level screening process "to ensure that funds are not improperly used." J.S., p. A-17. The first level of screening involves an evaluation of applicant institutions to determine if they award principally theological or seminarian degrees, J.S., pp. A-17 to A-18, or if their educational programs are principally religious in nature. Tr. 1578-80, 1588-90.[2] Several institutions have been disqualified from receiving aid under that screening process. J.S., p. A-47.

The second level of screening involves a determination by the Maryland Council of whether funds paid to eligible colleges have been spent in violation of the statutory prohibition against "sectarian" use of those funds. At the time that a college applies for its annual grant, its president is required to verify under oath that the funds will not be used for sectarian purposes. At the end of the fiscal year in which a grant is re-

[2] Citations to "Tr." in this brief refer to the transcript of the trial in the District Court.

ceived, the college must submit a utilization-of-funds report detailing how the funds were spent. That report must be accompanied by an affidavit verifying that none of the expenditures were for sectarian purposes. J.S., pp. A-47 to A-48.

The verified reports submitted by the colleges showing how state funds were spent are the principal vehicles by which the Maryland Council assures compliance with the statutory prohibition against sectarian use of those funds. Tr. 1515-17. If the information contained in those reports is insufficient or incomplete, the Maryland Council will seek, and in the past has sought, additional information. Tr. 1611-16, 1617-22. The Maryland Council can also request that state auditors conduct an independent examination of an institution's expenditure of state funds if there is any doubt that the expenditure was solely for nonsectarian purposes. But, as the District Court noted, "[t]he usage verification and the normal accounting which each college conducts obviate the need for state post-audit analysis in every case." J.S., p. A-48.

A total of 18 private colleges and universities in Maryland have received grants under the aid program since its inception. J.S., p. A-37 n.2. The five colleges originally named as defendants in this action received approximately one-third of the total funds awarded under the program during the first two years of its operation. *Id.*

B. The Proceedings Below

The appellants, four taxpayers of the State of Maryland, filed their complaint on March 29, 1972, alleging that the aid program they challenged violated the Establishment Clause of the First Amendment, as ap-

plied to the states through the Due Process Clause of the Fourteenth Amendment. J.A. 6.[3] Named as defendants were the Board of Public Works, three state officials who comprise the Board of Public Works, and five colleges that had received state funds under the aid program.[4]

The complaint alleged that the defendant colleges were "sectarian educational institutions" at which religion and religious activities infused the total educational program. J.A. 7-8. The complaint further alleged that the statute authorizing the aid program was unconstitutional on its face and as applied because it permitted public funds to flow to institutions of that character. J.A. 6, 9. Appellants requested an injunction against future operation of the aid program and an order requiring the appellee colleges to repay grant funds paid to them. A district court of three judges was convened pursuant to 28 U.S.C. §§ 2281, 2284.

After the disposition of several pre-trial motions, the appellants engaged in extensive discovery. The trial commenced on May 29, 1973 and continued intermittently over several weeks, ending on June 26, 1973. The transcript of the trial is almost 2,000 pages in

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[3] The original plaintiffs included two organizations, and the complaint also alleged that the Maryland college aid program also violated the Free Exercise Clause of the First Amendment. In response to pre-trial motions filed by the appellants, the district court dismissed the organizational plaintiffs for lack of standing and the Free Exercise claim for failure to state a claim. *American Civil Liberties Union* v. *Board of Public Works*, 357 F. Supp. 877 (D. Md. 1972).

[4] Among the colleges originally named as defendants was Western Maryland College. After this Court noted probable jurisdiction, appellants filed a motion under Rule 60 of the Rules of this Court dismissing Western Maryland College as an appellee.

length and contains the testimony of the presidents and staff and faculty members of the appellee colleges, one expert witness on the teaching of religion in the undergraduate curriculum, and the staff member of the Maryland Council who administers the challenged aid program. In addition, the parties introduced several hundred documents into evidence.

At the conclusion of the trial, the parties submitted extensive proposed findings of fact and lengthy briefs on the legal questions presented. Following oral argument, the court below issued its decision on October 16, 1974, ruling that the challenged statute was constitutional and that payment of public funds to the appellee colleges did not offend the Establishment Clause. J.S., p. A-1. Circuit Judge Bryan dissented. J.S., p. A-26. The court also entered separate findings of fact to which all three judges subscribed. J.S., p. A-35.

Following the entry of judgment, appellants sought from the court below an injunction to prevent payment to the appellee colleges of funds awarded them under the aid program following the filing of the complaint but held in escrow pending the decision by the district court. The District Court denied the appellants' motion on November 15, 1974 and this Court denied a similar motion by an order entered on November 25, 1974.

C. The Decision Below

The court below found no merit in appellants' constitutional claims by applying the three-part Establishment Clause test of purpose, primary effect and entanglement that this Court's decisions have evolved over the past several years. See *Lemon* v. *Kurtzman,* 403 U.S. 602, 612-613 (1971); *Tilton* v. *Richardson,* 403 U.S. 672, 678 (1971). The court below also scrupulously observed the sharp constitutional line that this Court's decisions have drawn between public aid to the higher and lower levels of church-related education. See *Tilton* v. *Richardson, supra,* 403 U.S. at 685-686; *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 777 n.32 (1973).

Since there was no serious dispute that the challenged statute had the requisite secular purpose, the court below focused on the primary effect and excessive entanglement branches of the controlling Establishment Clause test. In evaluating the primary effect of the challenged aid program, the court below carefully considered the two factors that this Court has isolated to determine whether the primary effect is to advance religion—namely, whether the aid in question "flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or . . . funds a specifically religious function in an otherwise secular setting." *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973).

With respect to the first of those factors, the court below concluded that the appellee colleges "are not so pervasively sectarian that aid [to them] would have a primary effect of advancing religion." J.S., p. A-11. That conclusion was based on the court's specific finding that the appellee colleges "conform closely to the colleges approved in *Tilton* v. *Richardson, supra.*" J.S., pp. A-10 to A-11. The court buttressed that conclusion by its particularized findings that none of the appellee colleges practice religious discrimination in faculty hiring and student admissions, that none compel their students to attend religious exercises, that religion does not in any way slant the content of courses taught by the appellee colleges and that all of the col-

leges foster an atmosphere of unfettered academic freedom. J.S., pp. A-38 to A-45; *compare Tilton* v. *Richardson, supra,* 403 U.S. at 686-87.[5]

The court below also ruled that the challenged aid program did not have an invalid primary effect because "[t]he aid program . . . cannot be said to fund a 'specifically religious activity in a secular setting.'" J.S., p. A-11. That ruling was based on the court's finding that "there are sufficient safeguards [in the statute and its administration] to prevent the use of funds for sectarian purposes." J.S., p. A-12. The court qualified that conclusion in only one respect. Because the court stated in its findings that it was unable to characterize how religion and theology courses at the appellee colleges were taught, J.S., p. A-46, it ruled that using state funds to support such courses "cannot be justified." J.S., pp. A-12 to A-13. Because the court found that the statutory prohibition against the use of state funds for sectarian purposes "must be interpreted as encompassing the study of religion or theology," J.S., p. A-50, it ruled that the Maryland Council "must take steps to ensure that public funds are not used to support such programs." J.S., p. A-13. Despite its professed inability to characterize how religion and theology are taught at the appellee colleges, the

[5] The court below noted that each appellee college "has as a secondary purpose the encouragement of the spiritual development of the students." J.S., p. A-19. These appellees do not dispute that conclusion. But the court stressed that "at none of these schools does this encouragement go beyond providing opportunities for religious experience." *Id.* The court also stressed that "[r]eligion does not permeate the secular educational function of these schools." J.S., p. A-14. It further stated that "[t]he religious programs at each school are separable from the secular programs, and the latter are the only beneficiaries of state aid." J.S., p. A-19.

court stressed that it was making no finding that those courses are in fact taught in a sectarian manner. J.S., p. A-50 n.9.

In its excessive entanglement analysis, the court below noted that this Court's decisions required it to evaluate the "character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." J.S., p. A-14. The appellants contended that the nature of the aid provided was the critical variable in the entanglement equation and that the aid challenged here was constitutionally infirm because, unlike the federal grants approved in *Tilton* v. *Richardson, supra,* it is not ideologically neutral. In an extensive analysis, the court below rejected that argument, J.S., pp. A-14 to A-21, relying principally on this Court's ruling in *Hunt* v. *McNair, supra,* that "the degree of entanglement . . . varies in large measure with the extent to which religion permeates the institution." 413 U.S. at 746.

The court below ruled that the administrative relationships that exist between state officials and church-related institutions under the challenged aid program were not entangling for two basic reasons. First, the court expressly found that "[r]eligion does not permeate the secular educational function of these schools." J.S., p. A-14. Because the challenged aid is strictly limited to the secular functions of recipient colleges, the administration of the program will result in no contact, let alone entanglement, between government and the religious activities of these institutions.

Second, because the court found that the appellee colleges varied hardly at all in their character and pur-

poses from the colleges involved in the *Tilton* case, it concluded there was no greater risk of entanglement in the administration of this program than there was in the *Tilton* program. "The relationship between church and state which results from this aid program is not entangling." J.S., p. A-17. Significantly, the court below noted that the aid program this Court approved in *Hunt* v. *McNair, supra,* "established a school-governmental relationship which was far more intimate and pervasive than any relationship likely to result from the statute now under consideration." J.S., p. A-21.

The court below also ruled that the appellee colleges need not repay any funds awarded them under the challenged aid program. The funds at issue were those awarded the appellee colleges during the first year of the aid program's operation and prior to the filing of the complaint. Under the principles set forth by this Court in *Lemon* v. *Kurtzman,* 411 U.S. 192 (1973) (*Lemon II*), the court refused to order repayment, although it had ruled that the statute was unconstitutional at the time of payment because it contained no restriction against sectarian use of grant funds. J.S., pp. A-23 to A-24. The dissenting judge concurred in the repayment ruling. J.S., p. A-34.

The dissent expressed no serious disagreement with the majority's analysis of how the aid program has functioned to date or of the essentially secular character of the appellee colleges. In fact, it appears that the dissenting judge subscribed fully to the findings of fact entered by the full court. Rather, the dissent was based on the fear that the challenged aid program had the "potential" for generating an invalid primary effect or excessive entanglement sometime in the indefinite future. J.S., pp. A-28, A-32, A-34.

D. Loyola College[6]

Loyola College, founded in 1852, is a coeducational liberal arts college located in the City of Baltimore. It is incorporated under the laws of the State of Maryland and is authorized by its charter "to confer any degree or degrees in any of the faculties, arts and sciences and liberal professions, which are usually permitted to be conferred in any college and university in the United States of America."[7] The sole authority for governing the college rests with its Board of Trustees.[8]

Loyola College's statement of objectives identifies it with the liberal arts tradition of higher education in this country. In its undergraduate divisions, the college offers courses in 26 academic departments leading to Bachelor of Arts and Bachelor of Science degrees.[9] Its liberal arts philosophy is reflected in the requirement that all students, irrespective of their major course of study, fulfill the requirement of a core curriculum designed to expose them to areas of study es-

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[6] The court below did not enter particularized findings with respect to each of the appellee colleges. It is quite clear from the generalized findings entered by the Court that these appellees —Loyola College and Mount Saint Mary's College— conform fully to the *Tilton* model of a church-related college eligible to receive public funds. The additional facts stated in this section and the following section concerning these appellees are designed solely to illuminate further the nature of the educational program offered by those institutions.

[7] Plaintiffs' Exhibit No. 121, pp. 6-7.

[8] Plaintiffs' Exhibit No. 144, app. B; Tr. 1138-39, 1246.

[9] Plaintiffs' Exhibit No. 121, pp. 55, 61; Tr. 1269.

sential to producing a liberally educated person.[10] The college is fully accredited by the Middle States Association of Colleges and Secondary Schools and is approved by the Maryland State Department of Education and the Regents of the University of the State of New York.[11]

Loyola College acknowledges that it is a church-related institution and that it has a secondary objective of encouraging the spiritual development of its students. However, as the court below expressly found, the pursuit of that objective does not go beyond "providing [students with] opportunities for religious experience." J.S., p. A-19. Participation by students in religious activities is totally voluntary. J.S., p. A-44. Loyola's relationship with the Roman Catholic Church is based on its identification with the Catholic and Jesuit tradition of liberal arts education[12] and the role that members of the Society of Jesus have played in founding and developing the college.[13] However, the

[10] See evidentiary citations collected in paragraphs 47 and 48 of the Proposed Findings of Fact submitted by Loyola College (hereinafter cited as "LC Proposed Findings"). The proposed findings are cited solely as a convenient collection of relevant evidentiary citations.

[11] Plaintiffs' Exhibit No. 121, inside cover.

[12] The evidence at trial, as well as the complete statement of objectives, make clear that the "Catholic" and "Jesuit" traditions referred to are educational in nature. The "Catholic" tradition is the adherence to the classical liberal arts program that includes the study of philosophy and theology in the core curriculum required of all students, a tradition that many liberal arts colleges have abandoned in recent years. Tr. 1170-74, 1634, 1644. The "Jesuit" tradition is found in the goal of producing liberally educated persons who will use their intellectual skills for the betterment of others. Tr. 1172-74; Plaintiffs' Exhibit No. 131, pp. 4-6.

[13] LC Proposed Findings, ¶¶ 46, 83.

college has no formal relationship with any ecclesiastical authority of the Roman Catholic Church and no official or agency of that Church exercises any juridical control over the college.[14] Loyola receives no financial assistance or support from any ecclesiastical or episcopal authority.[15] Based on these facts, the court below concluded that Loyola College, along with the other appellee institutions, is autonomous of any control or authority exercised by a religious body or organization. J.S., pp. A-16, A-43 to A-44.

Despite these aspects of its religious relationship, the court below expressly found that Loyola College is "characterized by an atmosphere of academic freedom rather than religious indoctrination." J.S., p. A-42. That finding, plus the court's conclusion that Loyola closely conformed to the characteristics of church-related colleges ruled eligible for public funds in *Tilton* v. *Richardson, supra,* is fully supported by the evidence. In essence, Loyola College is an institution "with admittedly religious functions but whose predominant higher education mission is to provide . . . students with a secular education." *Tilton* v. *Richardson, supra,* 403 U.S. at 687.

At the time of the trial of this case, Loyola College had received one grant in the amount of $157,000 under the challenged aid program. That grant was used for scholarships during the 1972-1973 academic year,[16] and the appellants conceded that no part of the grant was used directly for religious purposes.[17] The col-

[14] Tr. 1142-43, 1152.

[15] LC Proposed Findings, ¶ 86.

[16] J.S., p. A-50.

[17] Tr. 1182.

lege's Board of Trustees has directed that all future grants be placed in a separate checking account and specified that all future grants be used only for non-religious purposes.[18]

E. Mount Saint Mary's College

Mount Saint Mary's College, founded in 1808, is a coeducational liberal arts college located in Emmitsburg, Maryland. It is incorporated under the laws of the State of Maryland and is authorized by its charter "to confer on its deserving pupils collegiate honors and degrees of Bachelor and Master of Arts and of Doctors except Doctors of Medicine."[19] The sole responsibility for governance of the college rests with the Board of Trustees.[20]

Mount Saint Mary's statement of objectives defines its educational program in the context of the liberal arts tradition of higher education in this country.[21] The college offers courses in ten academic departments and awards students completing its four-year program Bachelor of Arts and Bachelor of Science degrees.[22] The college's liberal arts philosophy is reflected in the requirement that all students, irrespective of their major course of study, fulfill the requirements of the core curriculum, which consists of 48 semester hours of credit in six designated areas of study. The areas of study included in the core curriculum have been selected to satisfy the central goal of the liberal arts of educat-

[18] Tr. 1140-41.

[19] Defendants' Exhibit No. M-1.

[20] Plaintiffs' Exhibit No. 76, pp. 9-10; Tr. 738.

[21] Defendants' Exhibit No. M-2, pp. 6-7.

[22] *Id.* at pp. 40, 50-97.

ing the whole person.[23] The college is accredited by the Middle States Association of Colleges and Secondary Schools and by the Maryland State Department of Education. It is also recognized by the Regents of the University of the State of New York.[24]

Mount Saint Mary's College acknowledges that it is a church-related institution and that it has a secondary objective of encouraging the spiritual development of its students. However, as the court below expressly found, the pursuit of that objective does not go beyond "providing [students with] opportunities for religious experience." J.S., p. A-19. Participation by students in religious activities is wholly voluntary. J.S., p. A-44.

The college's relationship with the Roman Catholic Church is based on its self-description as "the second oldest Catholic college in the United States,"[25] the role that Roman Catholic priests have played in its founding and development,[26] and the presence of priests on campus who provide, outside the classroom, spiritual counseling to students who wish such counseling.[27] Neither the Roman Catholic Church nor any of its agencies exercise any control over or play any role in the governance or operations of the college.[28] The court below found that, "though the local head of the Catholic Church is an *ex officio* member of the Mt. St. Mary's Board of Trustees, no instance of entry of Church

[23] Tr. 745-47, 752; Defendants' Exhibit No. M-2, pp. 41-42.

[24] Tr. 744; Defendants' Exhibit No. M-2, p. 9.

[25] Defendants' Exhibit No. M-2, p. 8.

[26] *Id.*; Tr. 770-71.

[27] Tr. 753, 822-23.

[28] Tr. 757.

considerations into college decisions was shown." J.S., p. A-44. The college receives no financial support in any form from the Roman Catholic Church or any of its agencies.[29]

Despite these aspects of its religious relationship, the court below expressly found that Mount Saint Mary's College is "characterized by an atmosphere of academic freedom rather than religious indoctrination." J.S., p. A-42. That finding, plus the court's conclusion that Mount Saint Mary's closely conformed to the characteristics of the church-related colleges ruled eligible for public funds in *Tilton* v. *Richardson, supra,* is fully supported by the evidence. In essence, Mount Saint Mary's College is an institution "with admittedly religious functions but whose predominant higher education mission is to provide . . . students with a secular education." *Tilton* v. *Richardson, supra,* 403 U.S. at 687.

At the time of the trial in this case, Mount Saint Mary's College had received one grant in the amount of $117,500 under the challenged aid program. The court below expressly found with respect to that grant that "Mount St. Mary's employed restricted funds accounting, and demonstrated that no part of the grant . . . was used for sectarian purposes." J.S., p. A-50 to A-51. The Board of Trustees of the college has specified by resolution that all future grants from the state be placed in a separate checking account.[30]

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[29] *Id.*

[30] Tr. 817-18, 914.

SUMMARY OF ARGUMENT

I.

This Court's decisions have evolved a three-part test for determining whether an aid program for private education that benefits church-related schools is in conflict with the Establishment Clause. To pass that test, an aid program must have a secular purpose and a primary effect that neither advances nor inhibits religion and must not foster excessive government entanglement with religion. That test seeks to preserve the core Establishment Clause value of maintaining government's neutral posture when its actions affect religion or religious institutions.

While this Court's decisions have considered a variety of factors in applying the three-part Establishment Clause test, the decisive element in the Establishment Clause analysis is the religious character of schools that benefit from a challenged aid program. More specifically, those decisions focus on the extent to which religious indoctrination intrudes into and distorts the secular educational program of recipient schools. That factor explains why those decisions have drawn a sharp constitutional line between the higher and lower levels of church-related education. It also explains why this Court has had little difficulty sustaining aid to church-related colleges while, in recent years, consistently striking down aid programs for parochial elementary and secondary schools.

A challenged aid program must satisfy two conditions to meet the primary effect requirement. First, the enabling legislation must contain an express prohibition against religious use of public funds, and there must be effective administrative machinery to assure

that no recipient institution uses those funds for religious purposes. Second, the funds cannot flow to institutions at which religion is so pervasive that a substantial portion of their educational functions are subsumed in their religious missions. Whether recipient colleges are of that character is governed by the criteria applied by the Court in *Tilton* v. *Richardson,* 403 U.S. 672 (1971).

The entanglement branch of the Establishment Clause test does not bar all involvement of government in religious matters. In fact, the primary effect requirement that government prevent religious use of public funds necessarily means that an aid program will result in relationships between public officials and church-related colleges. What is prohibited is *excessive* entanglement with religion and, by its very terms, that test is one of degree.

Three factors enter into the entanglement analysis: the character and purposes of recipient colleges, the nature of the aid provided and the relationships between government and church-related institutions that result from the administration of the aid program. The first of those factors parallels the same inquiry in the primary effect analysis and is likewise governed by the criteria set forth in *Tilton* v. *Richardson, supra.* The second factor seeks to determine whether the aid extended is ideological in nature. The third factor examines whether, in light of the religious characters of recipient schools and the type of aid provided, government officials will necessarily become enmeshed in the religious activities of those institutions.

II.

That the Maryland aid program has the requisite secular purpose is not in dispute in this appeal. Thus, the primary effect and excessive entanglement branches of the controlling constitutional test are the focus of the inquiry. The findings of fact adopted by the court below establish beyond question that the primary effect of the Maryland aid program is not to advance religion and that there is no risk of excessive entanglement with religion in the administration of the program.

The enabling legislation for the Maryland program contains an explicit prohibition against the use of public funds for religious purposes, and the court below found that the Maryland Council has developed effective and non-entangling machinery for enforcing that prohibition. That conclusion is buttressed by the further finding that neither of these appellees used the grants they have received for religious purposes.

The findings concerning the educational programs of the appellee colleges reveal that those schools closely resemble the four church-related colleges found constitutionally eligible for public funds in *Tilton* v. *Richardson, supra.* For that reason, the court below reached the necessary conclusion that aid to those colleges will not have the primary effect of advancing religion.

Finally, the court below ruled that excessive government entanglement with religion has not resulted and will not result from the administration of the Maryland program. At the core of that ruling was the agreement by the court below with this Court's conclusion that the degree of entanglement varies in large measure with the extent to which religion permeates the secular educational program of a recipient college. Since the

appellee colleges are virtual mirror images of the *Tilton* colleges, there is no greater risk of government entanglement with religion here than there was in *Tilton*. The court below specifically rejected appellants' contention that the nature of the aid provided is the critical variable in the entanglement analysis and that the aid provided under the Maryland program is necessarily ideological in nature because it is broader in scope than the aid provided in *Tilton*. Consistent with this Court's decisions, the court below ruled that aid acquires an ideological coloration only if it flows to schools that have a "sectarian" character. The appellee colleges clearly are not of that character.

III.

The constitutional arguments fashioned by the appellants rest on a brittle foundation of factual and legal distortions. Appellants seek to support their arguments by culling from the extensive evidentiary record only those "facts" that support their constitutional claims. In the process, appellants totally disregard the carefully considered findings of fact adopted by the court below. Appellants invite this Court to draw factual conclusions that are completely in conflict with those findings and at war with the overwhelming weight of the evidentiary record in this case. Appellants' factual distortions are most blatant in their discussion of the faculty hiring and student recruitment practices at the appellee colleges, their characterization of how theology is taught at the appellee colleges, and their efforts to analogize the educational programs of the appellee colleges to those of the parochial schools involved in the *Lemon* and *Nyquist* decisions.

The partisan myopia that infects appellants' treatment of the evidentiary record also taints their reliance on this Court's Establishment Clause decision. Appellants seek to undermine the controlling authority of *Tilton* and *Hunt* by placing principal reliance on *Lemon* and *Nyquist*. But this Court drew a sharp constitutional line in *Tilton* between the higher and lower levels of church-related education for purposes of Establishment Clause analysis. *Lemon* and *Nyquist* dealt solely with parochial elementary schools, and the bases for those decisions are wholly irrelevant to determining the constitutional validity of the program of aid to higher education challenged here.

The essential basis for appellants' entanglement argument is the differences they perceive between the aid program challenged here and the aid program sustained in *Tilton*. However, the distinctions drawn by appellants either do not exist or have no constitutional significance. Appellants also suggest that the construction grants approved in *Tilton* constitute the outer limit of constitutionally permissible aid to church-related colleges. The *Tilton* decision will not support that crabbed construction of the Establishment Clause.

Appellants' primary effect argument is in total conflict with the explicit finding by the court below that "the primary effect of aid to these [colleges] is not to advance religion." That conclusion was based on the substantial findings that the Maryland program has an express prohibition against sectarian use of public funds, provides for effective but non-entangling enforcement of that prohibition, extends aid to institutions which are not pervasively sectarian, and will not result in public funding of religious activities. Appellants' contention that the Maryland program has a con-

stitutionally invalid primary effect is based solely on the pervasive evidentiary distortions that permeate their brief and assumptions about the controlling Establishment Clause decisions that are irrelevant to evaluating programs of aid to higher education.

Appellants conclude each of their various arguments with the sweeping assertion that the challenged aid program is unconstitutional on its face. A number of those arguments, however, are predicated upon practices which appellants allege exist at one or more of the appellee colleges. In making their sweeping claims of facial invalidity, appellants ignore the fact that thirteen private colleges and universities in Maryland which are not parties to this case receive grants under the challenged program and the right of those other institutions to receive those grants is in no way contested. Allegedly invalid practices at one or more of the appellee colleges cannot cause the entire program to fall, particularly in light of the severability clause in the enabling legislation. If this Court were to conclude that the practices of one or more of the appellee colleges render them ineligible for public aid, the only appropriate relief is to declare those institutions ineligible for public aid and to permit the Maryland program to continue to operate for the other eligible institutions.

IV.

Appellants also ask this Court to order the appellee colleges to repay to the state all grants received by them since this litigation was initiated. That request for relief is governed by this Court's decision in *Lemon II* and the equitable principles that decision enunciated. A proper application of those equitable principles requires that appellants be denied the relief of repayment, even if they should prevail on their main constitutional claims.

ARGUMENT

The central issue in this appeal—whether church-related educational institutions can, consistent with the strictures of the Establishment Clause, participate in a program of public aid to private education—presents no novel question to this Court. It is an issue that has been carefully and repeatedly scrutinized by the Court and that has produced seven major constitutional decisions in the past four years.[31] From those decisions has emerged a precise and definitive test for resolving that constitutional issue. That test is:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon* v. *Kurtzman,* 403 U.S. 602, 612-613 (1971); *Tilton* v. *Richardson,* 403 U.S. 672, 678 (1971).

The Court has employed that three-part test to sustain the only two programs of aid to higher education that it has examined. *Hunt* v. *McNair,* 413 U.S. 734 (1973); *Tilton* v. *Richardson, supra.*

The three-part standard enunciated in *Lemon* and *Tilton* is more than a test of constitutional validity; it is an expression of the core values underlying the Establishment Clause. Those values, which in many early decisions were often obscured by rhetoric and meta-

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[31] *Meek* v. *Pittenger,* 43 U.S.L.W. 4596 (U.S., May 19, 1975); *Committee for Public Education* v. *Nyquist,* 413 U.S. 756 (1973); *Levitt* v. *Committee for Public Education,* 413 U.S. 472 (1973); *Hunt* v. *McNair,* 413 U.S. 734 (1973); *Sloan* v. *Lemon,* 413 U.S. 825 (1973); *Tilton* v. *Richardson,* 413 U.S. 672 (1971); *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971).

phors[32] have become more clearly defined in recent years as the Court has been required to examine a variety of educational aid programs in the face of Establishment Clause challenges.

This Court's early decisions viewed the Establishment Clause as erecting a "wall of separation" between church and state.[33] But that metaphor has crumbled as the Court has attempted to apply the terse language of the Establishment Clause to diverse statutory and regulatory schemes. Indeed, the Court has conceded that "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon* v. *Kurtzman, supra,* 403 U.S. at 614. In that same decision, the Court observed: "Candor compels acknowledgement . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." 403 U.S. at 612; see also *Tilton* v. *Richardson, supra,* 403 U.S. at 678.

The Court has repeatedly insisted that the "constitutional standard is separation of Church and State." *Zorach* v. *Clauson,* 343 U.S. 236, 242 (1952); *Board of Education* v. *Allen,* 392 U.S. 236, 242 (1968). However, the Court has also stressed that the Establishment

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[32] In *Walz* v. *Tax Commission,* 397 U.S. 664, 668 (1970), the Court observed:

> "The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of [the Religion Clauses] that seemed clear in relation to the particular cases but have limited meaning as general principles."

[33] *Torcaso* v. *Watkins,* 367 U.S. 488, 493 (1961); *McCollum* v. *Board of Education,* 333 U.S. 203, 211 (1948); *Everson* v. *Board of Education,* 330 U.S. 1, 16 (1947).

Clause "does not say that in every and all respects there shall be a separation of Church and State." *Zorach* v. *Clauson, supra,* 343 U.S. at 312; see *Walz* v. *Tax Commission,* 397 U.S. 664, 670 (1970). "The problem, like many problems in constitutional law, is one of degree," *Zorach* v. *Clauson, supra,* 343 U.S. at 314; *Board of Education* v. *Allen, supra,* 392 U.S. at 242, and the degree of separation demanded is defined by the requirement that government be neutral in matters touching upon the religious affairs of its people.[34]

The principle of neutrality recognizes that, while separation of church and state is the constitutional goal, total separation of the two institutions into wholly separate spheres of activity is not possible in today's society. "The complexities of modern life inevitably produce some contact" between government and religious institutions. *Walz* v. *Tax Commission, supra,* 397 U.S. at 676. Particularly in the search for answers to modern social problems, the activities and concerns of religious organizations and government frequently overlap. See *McGowan* v. *Maryland,* 366 U.S. 420, 461-62 (1961) (opinion of Frankfurter, J.).

Churches and religious societies, along with other private groups, have long devoted generous amounts of time and energy to the problems of education, health and old-age security. In fact, in the early days of this nation, religious institutions and other private groups were virtually the only agencies in society en-

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[34] See, *e.g., Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 788 (1973); *Walz* v. *Tax Commission, supra,* 397 U.S. at 669-70; *Board of Education* v. *Allen,* 392 U.S. 236, 242 (1968); *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 226 (1963); *Zorach* v. *Clauson,* 343 U.S. 306, 313-14 (1952); *Everson* v. *Board of Education,* 330 U.S. 1, 18 (1947).

gaged in those general welfare activities.[35] With the rapid growth of the welfare state in this country, government has assumed an increasingly larger role in seeking solutions to social problems. But the effect of that expanding government activity has not been to displace the beneficial services performed by churches and religious societies. Those institutions have continued to maintain schools, hospitals, orphanages and homes for the aged, as their resources have permitted.

The resultant contacts between governmental agencies and religious institutions have been many and varied. Church-related schools are required to satisfy government standards for curriculum content and quality. See *Board of Education* v. *Allen, supra,* 392 U.S. at 245-46. Church-sponsored hospitals and nursing homes must comply with government health and safety standards. The government makes available to religiously affiliated institutions services, such as fire and police protection, sewage disposal, and public streets and highways, which are available to the public generally. *Walz* v. *Tax Commission, supra,* 397 U.S. at 670; *Everson* v. *Board of Education,* 330 U.S. 1, 17-18 (1947.) And, in some instances, government has chosen to work through private institutions, including those with religious affiliations, to achieve its social welfare goals. See *Bradfield* v. *Roberts,* 175 U.S. 291 (1899). In view of these necessary and inevitable interactions between church and state in modern society, the principle of neutrality assures a course of

[35] D. Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part II. The Nonestablishment Principle,* 81 Harv. L. Rev. 513, 513-16 (1968); W. Stanmeyer, *Free Exercise and the Wall: Obsolescence of a Metaphor,* 37 Geo. Wash. L. Rev. 223, 225-28 (1968).

governmental conduct which neither advances nor inhibits religion while permitting religiously sponsored activities to coexist in the secular world.

The principle of neutrality also serves to reconcile the dictates of the Establishment Clause with the frequently overlapping, and occasionally competing, commands of the Free Exercise Clause of the First Amendment. See *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 222 (1963). In fact, in *Everson* v. *Board of Education, supra,* the Court expressly acknowledged that applying the Establishment Clause mechanically to deny religious organizations the benefits of public welfare programs can pose a threat to Free Exercise Clause values. 330 U.S. at 16. More recently, the Court stated:

> "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with each other." *Walz* v. *Tax Commission, supra,* 397 U.S. at 668-69.

Thus, the principle of neutrality seeks to minimize the potential conflicts between the two religion clauses of the First Amendment and to promote the goal of religious liberty which both clauses are designed to implement.[36] The neutrality demanded of government by the Establishment Clause has been expressed in varying language by this Court, but the limitations imposed on government power by the command of neutrality are not in dispute. Governmental actions must be such that "no religion be sponsored, none commanded, and none prohibited." *Walz* v. *Tax Commission, supra,*

[36] See generally P. Kauper, *Religion and the Constitution* (1964).

397 U.S. at 669. Government can take no action that either advances or inhibits religion. *Board of Education* v. *Allen, supra,* 392 U.S. at 242-43; *Abington School Dist.* v. *Schempp, supra,* 374 U.S. at 222.

> "Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz* v. *Tax Commission, supra,* 397 U.S. at 669.

Careful observance of the principle of neutrality is essential in this case if core constitutional values are to be preserved. The Maryland aid program that the appellants challenge is in no sense a legislative scheme to promote church-related education. *Cf. Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 783 (1973). As the court below noted, no question has been raised concerning the grants paid under the Maryland program to the 13 private colleges and universities not joined as parties to this action. J.S. App., p. A-4. And those 13 institutions receive more than two-thirds of the funds disbursed under the aid program. J.S. App., p. A-37 n.2.

The issue, therefore, is whether the appellee institutions should be barred from participating in an aid program designed to benefit private higher education in Maryland solely because they can be labeled "church-related." The evidence in this case emphatically establishes—and the court below expressly found—that the appellee colleges offer educational programs that are essentially secular in nature and that their religious attributes are clearly separable from their educational programs. To hold that such institutions cannot share

in an aid program designed to benefit private higher education generally would be a breach of the principle of neutrality. It would smack of an expression of hostility to religion.

I.

THE CONSTITUTIONAL TEST

The court below ruled that the Maryland aid program has a secular legislative purpose. J.S. App., p. A-9. The appellants do not contest that holding in this appeal. Appellants' Brief, p. 15. Thus, only the primary effect and excessive entanglement branches of the controlling Establishment Clause test are at issue in this case.

This Court's recent decisions have identified a number of factors that must be considered in determining whether a program of public aid for private education has an invalid primary effect or generates excessive government entanglement with religion. Those factors include the character and purposes of the schools that benefit from the aid, the presence of restrictions against the use of public funds for religious purposes, the type of aid provided and the relationships that are created between government and church-related institutions by the aid program. But those decisions leave no doubt that the critical element in the analysis is the religious character of institutions that benefit from the aid and, more specifically, the extent to which religious indoctrination intrudes into the educational program of a recipient school.

It is significant, for example, that the religious character of recipient institutions is a central factor in applying both the primary effect and excessive entanglement branches of the Establishment Clause test.

Indeed, in its most recent school aid decision, this Court ruled that one aspect of a Pennsylvania aid program had "the unconstitutional primary effect of advancing religion *because of* the predominantly religious character of the schools benefiting from the Act." *Meek* v. *Pittenger,* 43 U.S.L.W. 4596, 4600 (U.S., May 20, 1975) (emphasis added). More importantly, the contrasting results reached by this Court over the past four years in cases involving church-related elementary and secondary schools, on the one hand, and church-related colleges and universities, on the other hand, can be explained only by the differing religious characters of the church-related institutions involved in those cases.[37] Since 1971, this Court has struck down every program of aid to church-related elementary and secondary schools it has considered.[38] During that same period, it has sustained each program of aid to private higher education it has reviewed, even though church-related colleges and universities participated in those programs.[39]

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[37] D. Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement,* 1971 Sup. Ct. Rev. 147, 169; P. Kauper, *Public Aid for Parochial Schools and Church Colleges: The Lemon, DiCenso and Tilton Cases,* 13 Ariz. L. Rev. 567, 585-87 (1971).

[38] *Meek* v. *Pittenger, supra; Committee for Public Education* v. *Nyquist, supra; Levitt* v. *Committee for Public Education, supra; Sloan* v. *Lemon, supra; Lemon* v. *Kurtzman, supra.* While the *Meek* decision did sustain the textbook loan provision of the Pennsylvania program, that portion of the opinion did little more than reaffirm the pre-1971 decision in *Board of Education* v. *Allen,* 392 U.S. 236 (1968). The other features of the Pennsylvania program that went beyond the limited scope of the aid approved in *Allen* were struck down.

[39] *Hunt* v. *McNair, supra; Tilton* v. *Richardson, supra.*

Those contrasting results are explained by the demonstrable differences this Court has correctly perceived between the educational goals and programs of the higher and lower levels of church-related education. For example, the Court noted in *Tilton* v. *Richardson, supra:*[40]

> "There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. The 'affirmative if not dominant policy' of the instruction in pre-college church schools is 'to assure future adherents to a particular faith by having control of their total education at an early age.' . . . There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. . . . The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the [legislative] objectives and limitations. Furthermore, by their very nature, college and post-graduate courses tend to limit the opportunities for sectarian influences by virtue of their own internal disciplines. Finally, many church-related colleges and universities seek to evoke free and critical responses from their students and are characterized by a high degree of academic freedom." 403 U.S. at 685-86.

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[40] The distinction between the higher and lower levels of church-related education was first drawn in the plurality opinion in the *Tilton* case. For convenience, however, the views expressed in the plurality opinion will be referred to throughout this brief as the views of the Court, since it is now clear that a majority of the Court has accepted the sharp constitutional line drawn in *Tilton* between the higher and lower levels of church-related education. See *Hunt* v. *McNair, supra; Committee for Public Education* v. *Nyquist, supra,* 413 U.S. at 777 n.32.

The sharp constitutional line that the Court has thus drawn between the higher and lower levels of church-related education underscores the central importance of the religious nature of institutions receiving public aid to the Establishment Clause issue in this case.

The decisions of this Court over the past four years leave no doubt that the intensity of a school's religious orientation, particularly in terms of its commitment to religious indoctrination,[41] is the decisive factor in applying the three-part Establishment Clause test. The fact that a college or university has religious attributes or performs religious functions is, standing alone, insufficient to disqualify such institutions from receiving public aid. The four Catholic colleges in the *Tilton* case were held eligible for public aid even though they performed "admittedly religious functions." 403 U.S. at 687. Under the *Tilton* and *Hunt* decisions, a college's religious character is constitutionally disabling only if its religious functions distort its secular educational program.

For example, the focus of this Court's primary effect inquiry in *Tilton* was whether "religion so *permeates the secular education* provided by church-related colleges and universities that their religious and secular *educational functions* are in fact inseparable." 403 U.S. at 680 (emphasis added). The secular integrity of course offerings was also stressed in the entanglement analysis in *Tilton*. The Court noted that the nature of "college and post-graduate courses tend to limit the opportunities for sectarian influence," 403

[41] See P. Kauper, *Public Aid to Parochial Schools and Church Colleges: The Lemon, DiCenso and Tilton Cases*, 13 Ariz. L. Rev. 567, 586 (1971).

U.S. at 686, and, as a result, "there is less likelihood . . . that religion will permeate *the area of secular education.*" 403 U.S. at 687 (emphasis added). Similarly, in *Hunt* v. *McNair, supra,* the Court noted that "there is no basis to conclude that the College's operations are oriented significantly towards sectarian rather than secular *education.*" 413 U.S. at 744 (emphasis added).

Consequently, the religious character of colleges benefiting from an educational aid program cannot be viewed in the abstract but must be considered in terms of its impact on the program of secular education offered by such institutions. That analysis explains the sharp constitutional line that this Court has drawn between the higher and lower levels of church-related education. That analysis is also central to the application of the controlling Establishment Clause test in this case.

A. Primary Effect

To pass constitutional muster, an educational aid program must have a "principal or primary effect that neither advances nor inhibits religion." *Lemon* v. *Kurtzman, supra,* 403 U.S. at 612. While the search for the requisite "primary" effect is not free of semantic difficulties,[42] the contours of the primary effect inquiry in this case have been firmly etched by the *Tilton* and *Hunt* decisions.

One point is now beyond question. If an aid program has the requisite secular effect, it is constitutionally irrelevant that it also has the incidental effect of conferring tangible benefits on religiously affiliated in-

[42] See *Committee for Public Education* v. *Nyquist, supra,* 413 U.S. at 783 n.39.

stitutions. This Court pointedly ruled in *Hunt* v. *McNair, supra:*

> "Whatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected. . . . Stated another way, the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." 413 U.S. at 742-43.

Any other rule would, of course, impose an absolute bar to the participation by church-related colleges in programs of public aid to private higher education. "The simplistic argument that every form of financial aid to church-sponsored activity violates the Establishment Clause was rejected long ago . . . ." *Tilton* v. *Richardson, supra,* 403 U.S. at 679.

The decision in *Hunt* v. *McNair, supra,* identifies the two gauges of primary effect in a higher education aid program:

> "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." 413 U.S. at 743.

The primary effect inquiry in this case, therefore, is reduced to isolating the criteria for determining whether either of those conditions is present here.

The question of whether public money funds a religious activity is governed by the decisions in *Board of*

Education v. *Allen,* 392 U.S. 236 (1968), and *Tilton* v. *Richardson, supra.* The *Allen* decision expressly recognized that church-related schools "are performing, in addition to their sectarian function, the task of secular education." 392 U.S. at 248. The challenged New York textbook loan law was sustained because the aid it provided was restricted to the secular educational functions performed by church-related schools. 392 U.S. at 244-45.

In *Tilton,* the Court noted that the challenged federal statute "was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious functions of the recipient institutions." 403 U.S. at 679. Specifically, the statute prohibited the use of any federally funded facility for "sectarian instruction or religious worship." 20 U.S.C. § 751(a)(2). The record in the *Tilton* case showed unequivocally that "none of the four church-related institutions in this case has violated the statutory restrictions." 403 U.S. at 680.

The Court in *Tilton* did, however, find one of the provisions of the federal statute constitutionally defective on primary effect grounds. The statute gave the federal government a 20-year interest in all funded facilities and required that the restrictions against any religious use of those facilities remain in force during the period of the federal interest. 20 U.S.C. § 754. As the Court construed the statute, all such restrictions would expire at the end of 20 years.

> "Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period. . . . If, at the end of 20 years the building is, for example, converted into a chapel or otherwise used

> to promote religious interests, the original federal grant will in part have the effect of advancing religion." 403 U.S. at 683.

Thus, public aid to church-related colleges will not survive the primary effect inquiry if the aid program does not have built into it a prohibition against religious use of public funds and adequate procedures for enforcing the prohibition. In addition, particular grants will be invalidated if the recipient school uses public funds to support its religious activities.

The second aspect of the primary effect inquiry in this case—whether religion is too pervasive at colleges benefiting from the challenged aid program—is governed by the *Tilton* decision. Despite the sharp constitutional line that the Court has drawn betwen the higher and lower levels of church-related education, the Court indicated in *Tilton* that not all church-related colleges will necessarily be eligible to participate in public aid programs. The appellants in that case fashioned a "composite profile" of a "sectarian" college and argued that an institution fitting that profile was constitutionally barred from participating in a public aid program. According to the appellants, a "sectarian" college is one

> "which admits only students of a particular religion, requires them to participate in religious activities, compels them to comply with the doctrines and dogmas of the religion, forces them to attend church, requires them under penalty of dismissal to take instruction in the theology and doctrines of the religion, and does everything to propagate and advance a particular religion other than confer degrees in divinity." Brief for Appellants, pp. 10-11, *Tilton* v. *Richardson, supra.*

The Court appeared to agree that a college with those characteristics could not, consistent with the Establishment Clause, participate in an educational aid program. 403 U.S. at 682. But the Court found that none of the appellee colleges in the *Tilton* case conformed in any way to that composite profile.

The Court in *Tilton* fashioned its own model of an eligible church-related college and evaluated the appellee institutions in that case on the basis of that model. The elements in the Court's model include a college's admissions and hiring policies, whether attendance at religious worship is required, whether efforts are made in the curriculum to indoctrinate students in religious doctrine and the degree of academic freedom that exists. The record in the *Tilton* case showed the following with respect to those criteria:

> "All four schools are governed by Catholic religious organizations and the faculties and student bodies are predominantly Catholic. Nevertheless, the evidence shows that non-Catholics were admitted as students and given faculty appointments. Not one of these four institutions requires its students to attend religious services. Although all four schools require their students to take theology courses, the parties stipulated that these courses are taught according to the academic requirements of the subject matter and the teacher's concept of professional standards. The parties also stipulated that the courses covered a range of human religious experiences and are not limited to courses about the Roman Catholic religion. The schools introduced evidence that they made no attempt to indoctrinate students or to proselytize .... Finally, ... these four schools subscribe to a well-established set of principles of academic free-

> dom, and nothing in this record shows that those principles are not in fact followed." 403 U.S. at 686-87.

The Court concluded that "the evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education." 403 U.S. at 687.

In *Hunt* v. *McNair, supra,* the Court relied directly on the *Tilton* model of an eligible church-related college in evaluating the institution whose application for aid had been questioned. After noting that the South Carolina Baptist Convention exercised certain control over the college's operation, the Court observed that "it was likewise true of the institutions involved in *Tilton* that they were 'governed by Catholic religious organizations.'" 413 U.S. at 743. The Court also stated that "there is no evidence here to demonstrate that the College is any more an instrument of religious indoctrination than were the colleges and universities involved in *Tilton.*" 413 U.S. at 746. In addition, the Court relied heavily on the *Tilton* criteria of nondiscriminatory admissions and hiring policies in finding that the college involved in *Hunt* was eligible to receive public aid. 413 U.S. at 743-44. Thus, the *Tilton* decision clearly establishes the controlling standards for determining whether a church-related college receiving public funds is "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." 413 U.S. at 743.

Consequently, an aid program in which church-related colleges participate will not have the prohibited primary effect unless those challenging the program

can prove[43] that there are not sufficient safeguards in the statute to prevent public funds from being used for religious purposes or that recipient colleges have such a pervasively sectarian character as described in the "composite profile" referred to in the *Tilton* decision.

B. Excessive Entanglement

The guideposts that have been set out for measuring an aid program's primary effect are noticeably lacking for evaluating whether excessive government entanglement with religion has resulted from such a program.[44] The difficulties of application inhere in the entanglement test itself. Involvement of the sovereign in religious matters or in the affairs of religiously affiliated institutions is not absolutely barred. What is prohibited is "*excessive* government entanglement with religion," and that test "is inescapably one of degree." *Walz* v. *Tax Commission,* 397 U.S. 664, 674 (1970) (emphasis added).

The Court explicitly acknowledged in *Lemon* v. *Kurtzman, supra,* that some involvement between government and religion is unavoidable.

> "Some relationship between government and religious organizations is inevitable. . . . Fire inspections, building and zoning regulations, and state law requirements under compulsory attendance

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[43] The burden of proving that a challenged aid program has an invalid primary effect is clearly on those bringing the challenge. *Hunt* v. *McNair, supra,* 413 U.S. at 746 n.8; *Board of Education* v. *Allen,* 392 U.S. 236, 248 (1968).

[44] "[C]ne must be wary of a simple barometric approach that would measure degrees of entanglement." D. Giannella, *Lemon and Tilton: The Bitter and Sweet of Church-State Entanglement,* 1971 Sup. Ct. Rev. 147, 172.

> laws are examples of necessary and permissible contacts. Indeed, under the statutory exemption before us in *Walz,* the State had a continuing burden to ascertain that the exempt property was in fact being used for religious worship." 403 U.S. at 614.

Moreover, when the Court invalidated the 20-year limitation on federal supervision of funded facilities in *Tilton,* it mandated a continuing and long-term involvement between the federal government and church-related colleges which receive federal grants. The problem, therefore, is to identify the line between permissible involvement and excessive entanglement.

The problem is complicated by the necessary interrelationship between the requirement of a primary secular effect and the strictures against excessive entanglement. As has already been noted, an aid program must contain sufficient safeguards to assure that public funds awarded to a church-related college will not support its religious activities. That requirement anticipates that there will be governmental oversight of how those funds are expended, creating an inevitable involvement of public officials in the affairs of a recipient college. The entanglement prohibition simply requires that any such administrative supervision of an aid program avoid *excessive* entanglement with religion.

Since this Court has rejected the argument that the Establishment Clause bars all aid to church-related institutions [45] the apparently conflicting commands of the effect and entanglement tests are not irreconcilable. There is a channel of permissible governmental action between the Scylla of an invalid religious effect and the

[45] *E.g., Tilton* v. *Richardson, supra,* 403 U.S. at 679.

Charybdis of excessive entanglement. The decisions in *Tilton* and *Hunt* illustrate that, at least in the higher education setting, it is a channel that can be safely navigated.

Three factors enter into the entanglement analysis: "the character and purposes of the institutions that are aided, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Lemon* v. *Kurtzman, supra,* 403 U.S. at 615. The more recent decision in *Hunt* v. *McNair, supra,* makes quite clear that the first of those factors—the character and purposes of schools benefiting from an aid program—is the critical variable in the entanglement equation.

> "The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement . . . varies in large measure with the extent to which religion permeates the institution." 413 U.S. at 746.

The character and purposes of recipient institutions must be evaluated in light of the *Tilton* criteria. Those criteria are designed to discern the extent to which a college's educational program is employed as a vehicle for religious indoctrination. The Court in *Tilton* found a direct correlation between the extent to which religion intrudes into a college's curriculum and the risk of excessive entanglement.

> "Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the

necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened." 403 U.S. at 687.

The *Tilton* colleges stood in sharp contrast to the parochial schools in *Lemon* v. *Kurtzman, supra,* which were involved in the "process of inculcating religious doctrine" and whose educational program thus became "a powerful vehicle for transmitting the Catholic faith to the next generation." 403 U.S. at 616. The Court explicitly ruled in *Lemon:* "The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid." *Id.*

The second variable in the entanglement analysis is the type of aid provided to church-related schools. The Court acknowledged in *Lemon* that government can extend to such schools "secular, neutral, or nonideological services, facilities, or materials." 403 U.S. at 616. The Court suggested that the teacher salary supplements at issue in *Lemon* were struck down because they were "ideological" in character while the federally funded buildings challenged in *Tilton* were valid because they were "nonideological" in character. 403 U.S. at 687-88.

Closer analysis, however, indicates that the difference in the type of aid provided in *Lemon* and *Tilton* was not a critical factor in the differing results on the entanglement issue in those cases. In both cases, public funds aided the instructional process in church-related schools. In *Lemon,* that process was aided by subsidizing the salaries of parochial school teachers. In *Tilton,* federal funds built the classrooms in which the instruction occurred. Just as the state officials in *Lemon* were

required to satisfy themselves that no teacher whose salary was paid with public funds engaged in religious instruction, the federal government in *Tilton* was obligated to prevent the use of any federally funded classroom for sectarian instruction. The danger of excessive entanglement flows from the prophylactic measures that government must take to prevent a religious use of public funds. Because the prophylactic measures that would be required under the *Lemon* and *Tilton* aid programs would be identical, the different entanglement holdings in the two cases cannot be satisfactorily explained by the type of aid provided or by labeling one "ideological" and the other "nonideological." The different results can be explained only by the differences the Court perceived in the religious orientation of the instructional processes in the church-related schools involved in *Lemon* and *Tilton.*

The third element in the entanglement analysis is the relationship that arises between government and church-related schools in the administration of an aid program. The *Lemon* decision identifies two types of administrative contacts with such schools that might lead to excessive entanglement with religion. The first involves the steps government officials must take to assure themselves that public funds are not diverted to religious uses. 403 U.S. at 615-19. The second is the imposition of certain accounting and auditing requirements to assure compliance with statutory restrictions. 403 U.S. at 621-22. The first of those two types of administrative contacts was clearly decisive in *Lemon,*[46]

[46] The key entanglement in *Lemon* . . . must be the required administrative surveillance of the educational process in church-related schools to determine that religious instruction is not mixed with the secular." D. Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement,* 1971 Sup. Ct. Rev. 147, 173.

and that type of administrative relationship was viewed as constitutionally disabling in that case because of the strongly religious character of the educational process in parochial elementary and secondary schools.

The analysis in *Lemon* of the administrative supervision required of parochial school teachers was tied directly to the educational processes in those schools.

> "The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith . . . . Inevitably some of the teacher's responsibilities hover on the border between secular and religious orientation . . . . [A] dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral . . . . With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine." 403 U.S. at 618-19.

Because there was no clear separation between the secular and the religious in the educational process in parochial schools, public officials would have to exercise close supervision over the activities of teachers whose salaries were paid with state funds. The state

> "has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion. . . . A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. . . . These

> prophylactic contacts will involve excessive and enduring entanglement between church and state." 403 U.S. at 619.

There is little question, therefore, that the administrative supervision of the educational process in parochial schools was, standing alone, a sufficient basis for striking down the aid programs challenged in *Lemon*.

The suggestion in *Lemon* that the accounting and auditing requirements of an aid program might be an independent basis for finding excessive entanglement is also explained by the religious character of the parochial schools in that case.[47] There is nothing inherently religious or sectarian about bookkeeping methods and practices. It was not the auditing process itself that was of concern but the judgments that public officials might be required to make as the result of an audit. Thus, the Court spoke of "the government's post-audit power to inspect and evaluate a church-related school's financial records and *to determine which expenditures are religious and which are secular.*" 403 U.S. at 621-22 (emphasis added). Those determinations can be difficult and potentially entangling where there is a blending of the secular and the sacred in the educational process. But if public aid is restricted to a church-related school's secular educational functions and if its secular educational program is not a vehicle for religious indoctrination, no such judgments will be

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[47] It is doubtful that the aid programs challenged in *Lemon* would have been struck down solely because of the accounting and auditing requirements of those programs. "Entanglement through bookkeeping apepars to be merely a make-weight argument." D. Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 Sup. Ct. Rev. 147, 166.

necessary in the auditing process. For that reason, auditing provisions in an aid program pose a threat of government entanglement with religion only if the secular and the religious are not separable in the educational programs of church-related schools benefiting from the aid.

Any other approach to the auditing problem would produce anomalous results. Auditing provisions are a common adjunct to government grant programs to assure a proper accountability for public funds. The accountability requirements are particularly stringent when grants are extended to private institutions and organizations.[48] Legislatures clearly have the right and duty to impose strict accountability requirements on the disbursement of public funds. Taxpayers demand nothing less. To suggest that such accountability provisions in an aid program will, by their own force, produce excessive entanglement would be to encourage fiscal irresponsibility in the administration of such aid programs. Moreover, government would be frustrated in its efforts to comply with the primary effect requirement of assuring that no public funds are spent by church-related institutions for religious purposes.

Thus, as was true in the application of the primary effect branch of the controlling Establishment Clause test, the extent to which religion infuses the educational program of a church-related school is the central focus of the inquiry into whether a school aid program will

[48] See *e.g.*, Hill Burton Act of 1964, 42 U.S.C. § 291; Mental Retardation Facilities and Mental Health Centers Act, 42 U.S.C. §§ 2261, 2281-88q; Economic Opportunity Act, 42 U.S.C. §§ 2701, 2711-68, 2941-80.

result in excessive government entanglement with religion.[49]

II.

APPLYING THE CONSTITUTIONAL TEST

The Court below ruled that the Maryland college aid program has a primary secular effect and presented no risk of excessive government entanglement with religion. Those rulings are fully supported by the extensive evidentiary record of this case.

A. Primary Effect

The court below found that "the primary effect of aid to [the appellee colleges] is not to advance religion." J.S. App., p. A-43. That ruling was based on the court's conclusions that the aid to the appellee colleges did not fund a specifically religious activity in a secular setting and that none of the appellee colleges was pervasively sectarian. J.S. App., pp. A-10 to A-13.

The authorizing legislation for the Maryland aid program contains an express prohibition against any religious use of the funds awarded to eligible institutions. "None of the moneys payable under this subtitle shall be utilized by the institutions for sectarian

[49] The Court in *Lemon* identified a "broader base of entanglement" that could arise from a school aid program—namely, the potential for political divisiveness that might develop along religious lines. 403 U.S. at 622-24. The Court noted in *Tilton*, however, that such divisiveness is unlikely to result from a program of aid to higher education in which church-related colleges participate. 403 U.S. at 688-89. Moreover, the suggestion that political divisiveness may be an independent Establishment Clause ground for invalidating legislation raises serious questions of infringement of other First Amendment rights. See D. Louisell, Book Review, 83 Yale L.J. 197, 207-08 (1973).

purposes." J.S. App., p. A-54. In addition, any institution which awards only seminarian or theological degrees is ineligible to receive funds under the program. J.S. App., p. A-53. Those limitations vary only in their verbal formulation from the restrictions imposed under the aid programs challenged in *Hunt* and *Tilton*. In both of those cases, the statutes in question provided that no aid could be awarded for

> "any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination." 413 U.S. at 736-37; see 403 U.S. at 675.

The statutory restrictions in the Maryland program fairly encompass those prohibitions. And, in both *Hunt* and *Tilton*, this Court found those restrictions sufficient to satisfy the primary effect requirement.

The *Tilton* decision also stressed that the statutory religious use restrictions "have been enforced in the Act's actual administration." 403 U.S. at 680; see also *Hunt* v. *McNair, supra*, 413 U.S. at 744-45. The court below came to a similar conclusion when it ruled that the Maryland program contains "sufficient safeguards to prevent the use of funds for sectarian purposes." J.S. App., p. A-12. That conclusion was based, *inter alia*, on the fact that the president of each recipient college must verify under oath that no public funds will be used for sectarian purposes and that the Maryland Council has developed effective procedures for verifying that no portion of a grant is used for religious purposes. J.S. App., pp. A-47 to A-49. The effectiveness of these administrative procedures is underscored by

the specific finding that neither of these appellees had used their state grants for religious purposes. J.S. App., pp. A-50 to A-51. Thus, the Maryland program clearly satisfies the primary effect requirement that public funds not be used to fund a specifically religious activity.

The findings entered by the court below also emphatically establish that the Maryland program satisfies the second primary effect requirement that no public funds flow to "pervasively sectarian" institutions. The court below explicitly stated:

> "The . . . defendant [colleges] in this case have been found to conform closely to the colleges approved in *Tilton* v. *Richardson, supra*. . . . Thus, as a matter of fact the defendants are not so pervasively sectarian that aid [to them] would have a primary effect of advancing religion." J.S. App., pp. A-10 to A-11.

That holding is fully supported by the following remarkable parallels between the appellee colleges and the *Tilton* colleges:

1. In *Tilton*, "[a]ll four schools are governed by Catholic religious organizations." 403 U.S. at 686. The court below found that "each of the [appellee colleges], with the exception of St. Joseph's College, have, or recently had, quotas for membership on the governing board based on religion or membership in a religious order." J.S. App., p. A-43. But, as this Court ruled in *Hunt*, "formal denominational control over a liberal arts college does not render all aid to the institution a violation of the Establishment Clause." 413 U.S. at 746 n.8.

2. In *Tilton*, the faculties and student bodies at the four colleges were "predominantly Catholic" but "non-

Catholics were admitted as students and given faculty appointments." 403 U.S. at 686. The court below found that the appellee colleges did not discriminate on religious grounds in faculty hiring or student admissions. J.S. App., pp. A-40 to A-41, A-44.

3. In *Tilton,* "[n]ot one of these four institutions requires its students to attend religious services." 403 U.S. at 686. The court below found that "none of the [appellee colleges] require attendance at any religious exercise." J.S. App., p. A-44.

4. In *Tilton,* the evidence showed that the four colleges "made no attempt to indoctrinate students or to proselytize." 403 U.S. at 687. The court below found that "religious indoctrination is not a substantial purpose or activity of ary of the [appellee colleges]." J.S. App., p. A-47.

5. In *Tilton,* "these four schools subscribe to a well-established set of principles of academic freedom, and nothing in this record shows that these principles are not in fact followed." 403 U.S. at 687. The court below found that "[e]ach [appellee college] subscribes to the 1940 Statement of Principles on Academic Freedom of the American Association of University Professors, and each obviously abides by it." J.S. App., p. A-39.

In view of those remarkable parallels, the court below borrowed directly from the *Tilton* decision for its more general conclusions that "courses at each [appellee college] are taught 'according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards,'" J.S. App., A-40, and that "each [appellee college] is 'characterized by an atmosphere of academic

freedom rather than religious indoctrination.'" J.S. App., p. A-42.

The only point of arguable departure between the findings in this case and the *Tilton* criteria is in the area of the teaching of theology or religion courses. The observations in *Tilton* on that issue were based on the stipulations of the parties. See 403 U.S. at 686-87. There were no such stipulations in this case, and the court below made only limited findings on the issue because it found itself "unable to characterize the manner in which theology and religion courses are conducted." J.S. App., p. A-42. However, the court below stressed that it was making no finding that the appellee colleges teach theology and religion in a sectarian manner. J.S. App., p. A-50 n.9. In addition, the court below also emphasized that its limited findings with respect to how theology is taught in no way impaired its more general finding that "religious indoctrination is not a substantial purpose or activity of any of these [appellee colleges]." J.S. App., pp. A-46 to A-47.

The vacillation by the court below on the theology question appeared to stem from its belief that it was not "legally empowered . . . to characterize the manner in which theology and religion are studied at these schools." J.S. App., p. A-46. Had the court below not felt it was under legal constraint, it would have found that evidence overwhelmingly demonstrated that these appellee colleges teach theology in a strictly academic fashion and make no effort in their theology courses to advocate a particular religious viewpoint.[50]

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[50] The evidence on the theology issue presented by these appellees is sumarized in the Mount Saint Mary's College Proposed Findings of Fact, ¶¶ 51-61, and the Loyola College Proposed Findings of Fact, ¶¶ 49-57.

Thus, consideration of the evidentiary record on that issue would show that these appellees match precisely the model fashioned in *Tilton* of church-related colleges eligible to receive public funds. The appellee colleges are, therefore, "institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education." 403 U.S. at 687.

If aid to the four Catholic colleges in the *Tilton* case did not have the primary effect of advancing religion, aid to other church-related colleges having identical characteristics cannot have such an effect. The appellee colleges were found to possess those characteristics, and the court below was clearly correct in concluding that "the primary effect of aid to [the appellee colleges] is not to advance religion." J.S. App., p. A-43.

B. Excessive Entanglement

As mandated by this Court's prior decisions, the court below examined the character and purposes of the appellee colleges, the form of aid provided under the Maryland program and the administrative procedures under the program to determine whether excessive government entanglement with religion has been a by-product of the program. The court below concluded that no such entanglement has resulted or would result.

Having already found that the appellee colleges had the essential characteristics of the *Tilton* colleges, the court below disposed quickly of the first part of the entanglement analysis.

> "It need only be noted that these schools perform essentially secular educational functions and are quite similar to the defendant schools in *Tilton*.

> Religion does not permeate the secular educational functions of these schools." J.S. App., p. A-14.

Because the appellants had argued, as they do in this Court, that the nature of the aid provided is the critical variable in the entanglement equation, the court below focused on that factor in its analysis.

After reviewing the forms of aid to church-related education that this Court has approved and disapproved, the court below said:

> "What emerges from a consideration of these cases is the conviction that the ideological neutrality of a particular program of aid is dependent on the type of institution that is being benefited. The classroom buildings provided in *Tilton* and *Hunt* are no more neutral in the abstract than the classroom buildings which were maintained with public funds in *Nyquist*. The classes taught in *Tilton* and *Hunt* classrooms are no more neutral than the classes taught by publicly subsidized teachers in *Lemon*, all other things being equal. Obviously, all other things are not equal. What would be impermissible in an institution staffed by members of a particular faith, administratively controlled by a religious body, and dedicated to the inculcation of a particular faith, may well be permissible in an autonomous institution staffed by faculty hired on the basis of academic merit, where academic freedom prevails, and where courses are taught in accordance with the requirements of an academic discipline." J.S. App., pp. A-15 to A-16.

For those reasons, the court below rejected appellants' contention that the Maryland aid program "is not ideologically neutral because in some respects it may resemble aid programs previously found unconstitutional in a lower school context." *Id.* at p. A-16. In

so ruling, the court below relied expressly on this Court's holding that "the degree of entanglement . . . varies in large measure with the extent to which religion permeates the institution." *Id.*

The court below acknowledged that the aid provided under the Maryland program is different in form from the aid approved in *Tilton* and *Hunt*. Those two cases involved special purpose grants that could be used by recipient colleges only for the construction of academic facilities. The Maryland program, by contrast, provides general-purpose or non-categorical grants which can be used for any purpose except those prohibited by the enabling legislation. The principal prohibition, of course, is that the grants cannot be used for sectarian purposes. The court below found the differences in the aid programs to be without constitutional significance.

> "Every non-sectarian program in the defendant colleges could be benefited by the federal aid program [approved in *Tilton*], and the difference between the *Tilton* aid program and the Maryland aid program resolves itself into a difference between construction grants and non-categorical grants. Clearly the latter distinction does not rise to constitutional dimensions." J.S. App., p. A-17.

That reasoning is unassailable. The Establishment Clause prohibits certain uses of public funds; it does not specify the purposes for which public funds can be used. The essential limitation imposed by the Establishment Clause is that public funds not be used for religious purposes. That limitation is observed in the Maryland program, even though the aid provided is non-categorical in nature.

Thus, a program of aid to private higher education acquires an ideological coloration, if at all, from the

ideological character of recipient institutions. On that issue, the court below ruled:

> "[T]he neutrality of the aid is dependent upon the essential character of the school. Where the secular aspects of a school may be separated from the sectarian, as in the case of these defendants, aid to the [secular] aspect, regardless of the form of the aid, will necessarily be religiously neutral. The aid in this program is restricted to the secular aspects of the institutions. . . . The religious programs at each school are separable from the secular programs, and the latter are the only beneficiaries of state aid." J.S. App., p. A-19.

On this basis, the court below concluded that the challenged aid program would not by its nature engender excessive government entanglement with religion.

Finally, the court below examined the administration of the Maryland program and ruled that "[t]he relationship between church and state which results from this aid program is not entangling." J.S. App., p. A-17. That ruling was based in part on the expertise that the Maryland Council had developed concerning the appellee colleges independent of its role as administrator of the aid program. *Id.* It was also based in part on the fact that the Maryland Council had developed an effective program for verifying nonreligious use of public funds without having to make difficult judgments over which expenditures were secular and which were religious. J.S. App., p. A-18. But central to that ruling was the finding that, "[b]ecause of the nature of the recipient schools, there is no necessity for state officials to investigate the conduct of particular classes . . . to determine whether a school is attempting to indoctrinate its students under the guise of secular education." *Id.* Significantly, the

court below also noted that the aid program challenged in *Hunt* was approved by this Court "even though it established a school-governmental relationship which was far more intimate and pervasive than any relationship likely to result from the statute now under consideration." J.S. App., p. A-21.

The court below did qualify its entanglement findings in one respect. Because it professed to be unable to characterize how theology and religion are taught at the appellee institutions and because it feared that those courses might "become an instrument for strengthening the students' religious life," J.S. App., p. A-49, the court feared that the Maryland Council might have to make an annual inquiry into how those courses are taught. Should such an inquiry be undertaken, "the risk of the Council becoming entangled with religion would be great." J.S. App., p. A-50. For that reason, the court ruled that

> "the Act must be administered so as to prevent any state funds from supporting the religious studies or theology programs at any institution. 'Sectarian purposes,' as that term is used in Art. 77A, §68A, must be interpreted as encompassing the study of religion or theology." *Id.*

If it is assumed that the theology courses at these appellees might be transformed into vehicles for religious indoctrination,[51] the narrowing construction of the "sectarian" use restriction is consistent with this

[51] These appellees disagree with that assumption. The evidence presented by these appellees on that issue establish beyond any doubt that their theology courses have an inherent academic integrity and that any effort to use those courses for religious indoctrination would do violence to the educational goals of the two institutions.

Court's Establishment Clause decisions. The lesson of *Lemon* v. *Kurtzman, supra,* and its progeny is that government must avoid not only actual entanglement but the potential for excessive entanglement with religion. If there is a perceived risk that the theology courses of the appellee colleges will be used to proselytize religion, the safer course is to prohibit those institutions from using public funds to support the teaching of those courses and thus avoid any potentially entangling inquiries into how those courses are taught.

It is clear that the Maryland statute is susceptible to the construction given it by the court below. The term "sectarian purposes" in the statute can fairly be construed to mean any religious purpose. Thus, including support for theology courses within the category of prohibited "sectarian" purposes is proper, even though the court below expressly refused to find that those courses are taught in a sectarian fashion at the appellee colleges. J.S. App., p. A-50 n.9.

Moreover, the *Hunt* decision supports the authority of the court below to construe the Maryland statute in a manner that avoids the potential for excessive entanglement. The statute challenged in *Hunt* purported to vest broad authority in a state agency over the operations of a college accepting the state aid. This Court characterized those powers as "sweeping" and added that "were there a realistic likelihood that they would be exercised in their full detail, the entanglement problems . . . would not be insignificant." 413 U.S. at 747. This Court noted, however, that the court below had given "a narrow interpretation of the practical operation of these powers." 413 U.S. at 748. For that reason, this Court ruled that the challenged aid

program did not "foreshadow excessive entanglement between the State and religion." 413 U.S. at 749. The court below has done nothing more in this case than the lower court did in *Hunt*. It has identified an area of potentially excessive entanglement in the administration of an aid program and it has eliminated that potential by a narrowing construction of the statute.

These appellees submit that the ruling by the court below that the Maryland aid program will not engender actual or potential excessive government entanglement with religion is fully supported by its findings of fact and the complete evidentiary record of this case.

III.

APPELLANTS' ESTABLISHMENT CLAUSE ARGUMENTS

The principal but unstated premise of the appellants' brief is that this Court should conduct a *de novo* review of the evidentiary record in this case. The appellants have grounded their Establishment Clause arguments in factual assumptions that are in conflict with the weight of the evidence and at war with the carefully considered findings of fact entered by the court below and subscribed to by all three judges below. This Court can accept the appellants' arguments only if it is willing to disregard those findings of fact and adopt the appellants' deliberately distorted version of the evidentiary record developed after a five-week trial.

The appellants had ample opportunity to persuade the court below to endorse their view of the evidentiary record. Following the lengthy trial of this case, all parties were given approximately two months to prepare and submit proposed findings of fact. All

parties in fact submitted extensive proposed findings.[52] Three months later the court below entered its initial findings and gave the parties an opportunity to submit written comments on and proposed revisions of the initial findings. That court heard extended oral argument on the written comments and proposed revisions and subsequently entered its final findings, which incorporated some of the proposed revisions.

The appellants participated fully at all stages of the development of the findings, which "constitute the sole factual basis" for the opinion of the court below. J.S. App., p. A-4. The court below was clearly unpersuaded by the appellants' distorted version of the evidentiary record since it rejected virtually all of the proposed findings they submitted. Nevertheless, the appellants have now filed a brief with this Court predicated on "facts" that are little more than a rehash of the proposed findings rejected by the court below.

Because evidentiary distortions so thoroughly permeate the appellants' brief, it would unduly lengthen this brief to discuss each of those distortions. But a few examples will illustrate the scope of the problem.

In an effort to support their unsupportable assertion that theology courses at the appellee colleges are "admittedly taught for religious purposes," Appellants' Brief, p. 21, appellants have wrenched from context a single sentence from the testimony of Dr. Felix Malmberg, Chairman of the Loyola College Theology Department. *Id.* at p. 73. That sentence purportedly supports appellants' assertion that "there is no sub-

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[52] For example, the proposed findings submitted by Loyola College and Mount Saint Mary's College were 37 and 44 pages in length, respectively.

stantial difference between the teaching of religion to precollege students *vis a vis* college students." *Id.* Appellants seek to use that single sentence from Dr. Malmberg's testimony to invite an inference based on an unstated premise. The unstated premise is that religion is taught to pre-college students in an indoctrinating fashion. And because Dr. Malmberg testified that theology should be taught to precollege and college students in the same fashion, appellants invite the inference that theology is in fact taught at Loyola for purposes of indoctrination.

What appellants neglect to quote is the sentence in Dr. Malmberg's testimony immediately following the sentence they excerpt in their brief. That sentence reads: "[T]he whole intention, the whole meaning of instruction in religion is not indoctrination, but is to inform." Tr. 1370. Thus, Dr. Malmberg's testimony relied upon by the appellants not only fails to support the inference they invite but totally contradicts it. When Dr. Malmberg testified that religion should be taught in the same manner to college and precollege students, he clearly meant that it should be taught in an academic manner at both levels.

There is a similar problem with appellants' effort to show that the study of theology at Mount Saint Mary's College "is an instrument for strengthening the students' religious life." Appellants' Brief, p. 72. The only "support" that appellants can marshall for that assertion is that "[t]he chairman of the theology department at Mount Saint Mary's College testified that in no case to his knowledge had any theology teacher taken a *personal* position contrary to the Roman Catholic Church." *Id.* (emphasis added) But the extent to which a professor injects his personal opinions into a course is hardly a criteria for determining whether the course is taught as an academic discipline. Indeed, peppering a course with personal opinions could easily undermine its academic integrity.

What the undisputed evidence does show is that members of the Theology Department at Mount Saint Mary's College are free to, and in fact do, present their students with viewpoints, whether personally held or not, that are in conflict with positions taken by the Roman Catholic Church or theological questions. Tr. 1053-54, 1058; Plaintiffs' Exhibit No. 116B, pp. 4-5, 8-9. That a course covers all academically relevant viewpoints, whether or not the professor agrees with those vewpoints, is a test of its academic integrity, and the theology courses at Mount Saint Mary's College clearly pass that test.

The appellants also assert, in direct conflict with the findings of fact, that "[f]our appellees have *de facto* religious restrictions on the admission of students...." Appellants' Brief, p. 66. To support that assertion with respect to Loyola College, appellants state that "[t]he major 'feeder' schools for Loyola College are Catholic high schools in the Baltimore metropolitan area; and the college continues to recruit at such schools." *Id.* at 68. Appellants conveniently ignore the undisputed evidence that representatives of Loyola's Admissions Office visit and recruit students at *every* high school in the State of Maryland except trade and vocational schools. Tr. 1324-25. Loyola can apparently avoid the charge of religious discrimination leveled by the appellants only by excluding all Catholic high schools from a recruiting program specifically designed to reach every high school in Maryland.

Finally, appellants make the wholly unsupported assertion that "the evidence plainly demonstrates that the advancement of religion . . . is a substantial activity or purpose of each institution." Appellants' Brief, pp. 46-47. To substantiate that claim, appellants simply reference other pages in their brief. The only arguable support in the pages referenced is the further assertion that "[f]acts demonstrating the extent and intensity of religiosity at these institutions are offered throughout this brief, the 'Appendix to Plaintiffs' Brief' filed below . . . and plaintiffs' proposed findings of fact." *Id.* at p. 20. Thus, the only "authority" appellants can cite for a "factual" claim that is central to their constitutional argument is their own distorted view of the evidentiary record.

Arrayed against the appellants' bald assertion are the carefully delineated findings of the court below on the scope of religious activity at the appellee institutions. J.S. App., pp. A-44 to A-45. Although the court found that each appellee college has the secondary objective of encouraging the spiritual development of students, it also found that "at none of these institutions does this encouragement go beyond providing the opportunities or occasions for religious experience." J.S. App., p. A-45. Such a low-key approach to religious activity hardly amounts to the advancement of religion as a "substantial purpose and activity." Indeed, that claim is particularly inappropriate with respect to Mount Saint Mary's College where less than one percent of the total budget is spent on religious activities. Tr. 924-25.

Evidentiary distortions and misstatements are so pervasive in the appellants' brief that they necessarily

undermine the validity of the factual assumptions of their constitutional argument. Whether those distortions and misstatements are the product of partisan myopia or excessive adversary zeal, it is important to recognize that they are absolutely essential to appellant's Establishment Clause argument. For the success of that argument rests on appellants' ability to persuade this Court that there are no meaningful differences between the appellee colleges and the parochial schools ruled ineligible for public aid in *Lemon* v. *Kurtzman, supra, Committee for Public Education* v. *Nyquist, supra,* and *Meek* v. *Pittenger, supra.* The findings of fact in this case are a complete answer to that contention. Those findings portray educational institutions that bear no resemblance to the parochial schools described in *Lemon* and *Nyquist.* Thus, when appellants' brief is stripped of its discredited factual underpinnings, their legal argument collapses under its own weight.

A. Excessive Entanglement

The core of the appellants' entanglement argument is the differences they perceive between the aid program they challenge and the aid program sustained in *Tilton.* The fatal flaw in that argument is that it rests on purported differences either that do not exist or that have no constitutional significance.

Of equal significance is an unstated premise of appellants' argument—namely, that the program of construction grants upheld in *Tilton* carried government to the brink of constitutional invalidity and that any higher education aid program that is broader in scope must fall under the entanglement doctrine. But *Tilton* cannot be read so narrowly. That decision set down general principles for evaluating the constitutional

validity of public aid programs that benefit church-related colleges. *Tilton* in no sense limited permissible aid to construction grants. For that reason, demonstrating that differences exist between the aid program challenged here and the aid program sustained in *Tilton* is not sufficient. What appellants must show is that those differences will engender the evils that the entanglement doctrine seeks to prevent. The appellants have failed to make such a showing.

1. Character of the Appellee Colleges

Appellants grudgingly acknowledge that the court below found that the appellee colleges are virtual mirror images of the *Tilton* colleges. Appellants' Brief, p. 19. Yet they insist on attempting to portray the appellee colleges as being little different from the parochial schools involved in the *Lemon* case.

> "Although the appellee institutions have certain characteristics of the *Tilton* schools, they also have characteristics of the *Lemon* schools." *Id.* at p. 20.

The basis upon which the appellants attempt to distinguish the appellee colleges from the *Tilton* colleges belies the validity of the comparison they attempt to make.

Appellants assert that there are "[a] number of distinctions between the *Tilton* institutions, *as reflected in this Court's opinion,* and the appellee institutions." *Id.* at p. 21 (emphasis added). But attempting to compare the appellee and *Tilton* colleges by comparing the entire evidentiary record in this case with the facts recited in the *Tilton* opinion is wholly invalid. This Court's opinion in *Tilton* did not undertake to recite

or even summarize all of the evidence at the trial of this case.[53] That opinion simply isolated and summarized those parts of the trial record which it viewed as relevant to the constitutional issues decided in *Tilton.* Record facts not discussed were obviously considered constitutionally irrelevant. For example, the appellants assert that "[t]he daily opportunities for worship offered by the colleges here are limited to Roman Catholic religious services." *Id.* at p. 21. The full evidentiary record in *Tilton* discloses that the opportunities for religious worship at the four *Tilton* colleges were likewise limited to Roman Catholic religious services.[54] The absence of any reference to that fact in the *Tilton* opinion simply indicates that this Court did not view that fact as constitutionally relevant. What was relevant was that attendance at religious services at the *Tilton* colleges was purely voluntary. 403 U.S. at 686. The court below made the same findings with respect to the appellee colleges, J.S. App., p. A-44, a finding that the appellants do not and cannot challenge.

The court below expressly ruled that the appellee colleges "have been found to conform closely to the colleges approved in *Tilton* v. *Richardson, supra.*" J.S. App., pp. A-10 to A-11. Appellants have provided no credible basis for contesting that explicit finding. Thus, there is no greater risk that the aid to the appellee colleges will pose a risk of excessive entangle-

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[53] The district court in the *Tilton* case heard testimony from 22 witnesses and received 155 documents in evidence. Brief of Appellee Colleges and Universities, p. 6, *Tilton* v. *Richardson, supra.*

[54] Appendix to Brief of Appellee Colleges and Universities, pp. 6a-7a, 11a, 17a, 22a, *Tilton* v. *Richardson, supra.*

ment than this Court found with respect to the *Tilton* colleges.

2. Nature of the Aid

In seeking to show that the aid program they challenge is unconstitutionally broad in scope, the appellants have resorted to an adjectival argument, substituting labels for analysis. For example, appellants rely on the *Tilton* decision for the proposition that the state may "provide church-related schools with secular, neutral or nonideological services, facilities, or materials." Appellants' Brief, p. 23. At the same time, the appellants claim that the Maryland aid program is "virtually undefined in scope," *id.* at p. 32, implying that it is therefore not ideologically neutral. But adjectives, like metaphors, are a shaky foundation for constitutional analysis. *Cf. McCollum* v. *Board of Education,* 33 U.S. 203, 247 (1948) (Reed, J., dissenting).

The appellants' characterizations notwithstanding, there is nothing ideological about the aid provided under the Maryland program. The state simply gives monetary grants to private colleges and universities, and there is nothing ideological about money. Furthermore, the aid provided is in no sense undefined in scope. The enabling legislation specifically prohibits grant recipients from using their grants for sectarian purposes, a restriction that is mandated by the Establishment Clause.

The appellants' complaint appears to be that colleges receiving the aid have wide latitude in deciding how to use it. But the existence of that latitude does not, by itself, give the aid an ideological coloration. The aid acquires a prohibited ideological coloration only if it is used for religious purposes by colleges receiving it. At root, the so-called ideological character of the aid depends on the intensity of the religious character of colleges receiving the aid. Since the appellee colleges are no more religious in character than the *Tilton* colleges, the aid provided here is no more ideological than the aid sustained in *Tilton*

Appellants, however, resort to the decisions in *Lemon* v. *Kurtzman, supra,* and *Levitt* v. *Committee for Public Education,* 413 U.S. 472 (1973), to argue that the aid program they challenge has a prohibited ideological character. Appellants' Brief, pp. 30-32. Noting that recipient colleges can use the Maryland aid to pay faculty salaries, including the salaries of faculty members who happen to be members of the clergy, appellants contend that *Lemon* and *Levitt* absolutely prohibit such use of public aid. That simplistic argument ignores the basis for the holdings in *Lemon* and *Levitt* and the clear constitutional line this Court has drawn between the higher and lower levels of church-related education.

The teacher salary aid programs at issue in *Lemon* were struck down because of the educational environment in which parochial school teachers function. This Court noted that the typical parochial school teacher "is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith." 403 U.S. at 618. It is only when those circumstances exist that using public funds for faculty salaries at church-related schools is constitutionally suspect. None of these circumstances exist at the appellee colleges.

Faculty members at the appellee colleges are employed not by "religious organizations" but by auto-

nomous educational institutions duly chartered and incorporated under the laws of the State of Maryland. *Cf. Bradfield* v. *Roberts,* 175 U.S. 291 (1899); *Speer* v. *Colbert,* 200 U.S. 130 (1906). Those faculty members are not "subject to direction and discipline of religious authorities" but fulfill their teaching obligations in an atmosphere of unfettered academic freedom. Indeed, the court below expressly found that faculty members at the appellee colleges "feel no religious pressures, by anyone, on their classroom presentation or their selection of texts and course materials." J.S. App., p. A-38. That finding is supported by considerable and undisputed evidence presented by these appellees that their faculty members come from a variety of religious backgrounds and expose their students to viewpoints that conflict with the officially adopted positions of the Roman Catholic Church. See J.S. App., pp. A-38 to A-39. Finally, those faculty members do no work "in a system dedicated to rearing children in a particular faith" but at educational institutions whose predominant goal is to provide a sound, secular education for their students. Thus, none of the conditions that raised the spectre of excessive entanglement in connection with teacher salary aid in *Lemon* exists here if the defendant colleges use public funds for faculty salaries.

Appellants also contend that "[t]he payment of state aid to clerics who are teachers strikes directly at the root of the establishment clause." Appellants' Brief, p. 31. Appellants rely on a brief excerpt from the *Nyquist* opinion for that sweeping misstatement of the law. *Id.* at pp. 31-32. The Court's reference in *Nyquist,* as in prior decisions,[55] was to the struggle in Virginia in 1785-1786 over a bill to pay the salaries of

[55] *E.g., Everson* v. *Board of Education,* 330 U.S. 1, 11-13 (1947).

ministers acting in their capacities as ministers. Nothing in the decided cases bars teachers who happen to be clergymen from sharing in public benefits available to teachers generally. The only issue is whether the individual is being paid for his activities as a teacher rather than as a clergyman.[56] Indeed, clergymen have in the past drawn, and continue today to draw, salaries from public funds without even the suggestion of constitutional difficulty. From our earliest days, clergymen have served in the state and federal legislatures and have been paid for their services with public funds.

Thus, there is no basis for appellants' sweeping assertion that the Maryland aid program is invalidly ideological in character. That aid program is concededly broader in scope than the aid programs approved in *Tilton* and *Hunt.* But the broader scope of the aid program does not make it ideological in character. Appellants have gone to great lengths to demonstrate the differences between the Maryland aid program and the *Tilton* and *Hunt* programs without showing that those differences have any constitutional significance.

3. Resulting Administrative Relationships

The appellants' contention that the administration of the Maryland aid program will unconstitutionally entangle state officials in the religious affairs of the appellee colleges is in direct conflict with the findings of fact entered by the court below. J.S. App., p. A-49.

[56] In fact, there is no absolute constitutional bar against government paying the salaries of clergymen to act in their ministerial roles. Each house of Congress has a chaplain whose salary is paid with public funds. Military and prison chaplains likewise are on the public payroll.

That contention also rests on some serious misconception about the basis for the entanglement rulings in *Tilton* and *Lemon*.

The first of those misconceptions is the appellants' apparent assumption that the mere existence of an ongoing relationship between public officials and church-related institutions is barred by the entanglement doctrine. This Court laid that assumption to rest in *Lemon* when it noted that "[s]ome relationship between government and religious organizations is inevitable." 403 U.S. at 614. It is only those relationships that enmesh government in the religious affairs and activities of religious organizations that are constitutionally suspect. Thus, simply listing the points of contact between state officials and the appellee colleges, as the appellants have done at pages 39-41 of their brief, proves nothing. Appellants have failed to make the critical showing that those contacts have involved or will involve state officials in the religious affairs and activities of the appellee colleges.

The appellants' second misconception is their belief that the type of administrative supervision required under the *Lemon* and *Tilton* aid programs was significantly different. In both cases, the aid supported the classrooms or the classroom instruction at church-related schools, and full and vigorous enforcement of the restriction against sectarian use of the aid in both cases would have required government surveillance of classrooms. Because this Court believed that the instruction in parochial schools involved a blending of the religious with the secular, the Court feared that government surveillance of parochial school classrooms would inevitably entangle public officials in religious matters. But because the Court found that the instruc-

tion at church-related colleges has an inherent secular integrity, the *Tilton* entanglement holding rested on the assumption that classroom surveillance would be unnecessary and, if conducted, would not involve public officials in religious matters. Thus, the contrasting results in *Lemon* and *Tilton* are explained not by any difference in the administrative supervision required under the aid programs but by the substantial differences in educational processes at the lower and higher levels of church-related education. Because the appellee colleges have the essential characteristics of the *Tilton* colleges, the potential for administrative entanglement with religion is as minimal under the Maryland aid program as it was in *Tilton*.

Perhaps the most serious defect in the appellants' argument is their attempt to obscure the realities of the administration of the Maryland program. The relationship that exists between the Maryland Council and the appellee colleges is essentially a "paper" relationship. The principal enforcement machinery is information supplied by the colleges at the time they apply for grants and at the time they report on how the grants were used. There is no evidence that classroom inspection or surveillance has been conducted or will be necessary for effective enforcement of the sectarian use restriction. And the appellants have made no showing that the limited relationships that exist under the aid program will be inadequate to enforce that restriction. Indeed, the court below explicitly found that the existing enforcement machinery will be effective and non-entangling. J.S. App., pp. A-47 to A-49. That machinery has been deliberately structured to avoid the type of entanglement the Establishment Clause prohibits, and the court below concluded that the

Maryland Council has successfully navigated the channel between ineffective and excessive enforcement.

> "The Council has shown no indication to enmesh itself *unnecessarily* in the recipients' affairs. The Act does not require administrative entanglement, there is no entanglement in the present procedures, and no cause to speculate that the Council will redefine its responsibilities to create a problem in the future." J.S. App., p. A-49 (emphasis added).

Thus, the appellants' contention that the Maryland aid program has created or has the potential for creating unconstitutional government entanglement with religion lacks any evidentiary or analytical support.

4. Political Entanglement

This Court has suggested in dicta that aid programs benefiting church-related schools might be constitutionally invalid if they have the potential for creating political divisiveness along religious lines.[57] The appellants make the rather incredible assertion that the Maryland aid program contains the potential for such political entanglement. The sole support they can marshall for that assertion is that "at least one college president, who is a Jesuit priest, has already advocated aid to private colleges 'in the political arena.'" Appellants' Brief, p. 45. The person to whom they refer is Rev. Joseph A. Sellinger, S.J., the President of Loyola College. Father Sellinger is also a duly appointed member of the Maryland Council for Higher Education and he expressed his support for aid to private colleges in that capacity at an official meeting of the Maryland Council. SDX-4.

[57] *Meek* v. *Pittenger, supra,* 43 U.S.L.W. at 4603; *Lemon* v. *Kurtzman, supra,* 403 U.S. at 622-24; *Committee for Public Education* v. *Nyquist, supra,* 413 U.S. at 794-98.

Appellants' reliance on Father Sellinger's statement to support their political entanglement argument is bizarre in several respects. First, there is nothing religious or potentially divisive about advocating aid for *private* colleges, irrespective of the arena in which the advocacy is conducted. Second, appellants are suggesting that Father Selinger must curb his advocacy of aid to private colleges or risk placing any such program in consitutional jeopardy. Finally, the logical extension of appellants' argument is legislation becomes constitutionally suspect if it has the vocal support of persons who happen to be clergymen. Would the appellants contend that the Civil Rights Act of 1964 is unconstitutional because it was strongly advocated "in the political arena" by Dr. Martin Luther King and other prominent clergymen?[58]

It is somewhat disturbing to find these appellants, who purport to be championing civil liberties in this litigation, suggesting that those who have the status of clergymen must forego their First Amendment rights of free speech and to petition government for a redress of grievances if they expect legislation they support to pass constitutional scrutiny. The appellants have carried the political entanglement doctrine to the extreme of advocating the very religious intolerance that the Establishment and Free Exercise Clauses were designed to guard against.

[58] See J. Choper, *The Establishment Clause and Aid to Parochial Schools,* 56 Calif. L. Rev. 260, 273, 277 (1968).

B. Primary Effect

The court below, after a careful review of the evidentiary record, found explicitly that "the primary effect of aid to [the appellee colleges] is not to advance religion." J.S. App., p. A-43. Nevertheless, appellants argue at considerable length in their brief that, in six different respects, the Maryland aid program has a constitutionally invalid primary effect. In the process, appellants refuse even to acknowledge the primary effect finding entered below and the evidentiary support for that finding. The bases upon which the appellants would have this Court disregard the carefully considered finding on that issue are totally lacking in factual and legal substance.

1. Restrictions Against Sectarian Use

Appellants make a two-pronged argument to support their contention that the challenged aid program has an invalid primary effect because it contains inadequate safeguards to prevent public funds from being used for religious purposes. First, they itemize certain uses which recipient colleges can make of their grants, implying that those uses are necessarily religious in nature. Second, they seek to show gaps in the administration of the aid program which they contend will produce ineffective enforcement.

Initially, it must be reiterated that the Maryland aid program contains the one restriction that is constitutionally mandated—namely, that no public funds received by a college can be used for "sectarian purposes." J.S. App., p. A-54. That prohibition is as broad in its scope as comparable provisions in the aid programs upheld in *Tilton* and *Hunt*. Thus, the Maryland program clearly satisfies one of the essential

constitutional requisites under the primary effect doctrine.

The appellants, however, emphasize that the Maryland program does not prohibit the use of public funds for faculty salaries, scholarships and building maintenance and repair. Appellants' Brief, pp. 50-55. But none of those uses of public funds is inherently sectarian in nature. Appellants invite a contrary conclusion by relying on decisions of this Court that are inapposite.

The asserted invalidity of using public funds to pay faculty salaries is drawn from the decision in *Lemon* v. *Kurtzman, supra.* But, as this brief has already demonstrated, such a use of public funds is barred only when faculty members teach in an educational environment comparable to that of the parochial schools involved in the *Lemon* case. No such environment exists at the appellee colleges, and the *Lemon* ruling on faculty salaries simply does not apply to this case. To the extent that some faculty members at the appellee colleges might be involved in sectarian, rather than secular, activities, the prohibition against sectarian use of grant funds would prohibit the payment of their salaries with those funds.

The plaintiffs rely solely on *Committee for Public Education* v. *Nyquist, supra,* in contending that an invalid primary effect is generated when grants are used for building repair and maintenance. Appellants' Brief, pp. 53-55. But *Nyquist* dealt with that form of aid in the parochial school context, and the ruling in that case was based on two considerations absent from this case. First, the Court found that it was impossible in the parochial schools to isolate facilities used for

secular purposes from those used for religious purposes. 403 U.S. at 774. Second, nothing in the New York program barred the use of public funds for the repair and maintenance of chapels and other religious facilities. *Id.* The court below expressly found that secular and religious activities are clearly separable at the appellee colleges. J.S. App., p. A-19. In addition, the prohibition against sectarian use of grant funds imposes the very restriction in this case that was absent in *Nyquist*.

Appellants also rely on *Nyquist* to argue that the use of public funds by the appellee colleges for scholarships is barred by the primary effect doctrine. But the same day that *Nyquist* was decided this Court refused to review a decision upholding an analogous program of aid to higher education.[59] *Durham* v. *McLeod*, 192 S.E. 2d 202 (1972), *appeal dism'd for want of substantial federal question*, 413 U.S. 902 (1973). Again, this Court has perceived qualitative differences between the higher and lower levels of church-related education that appellants apparently cannot comprehend. Appellants also contend that the use of funds provided under the Maryland program for scholarships is constitutionally defective because one of the appellee colleges employs religious considerations in awarding scholarships. It should be emphasized that no religious considerations enter the scholarship decisions at Loyola College, the only appellee that has made such

[59] The *Durham* case involved a program of loans to college students to help them meet their college expenses, and not scholarships. But the practical effect of that loan program is the same as a scholarship program. In each case, funds provided by the state are passed through the conduit of students to church-related colleges which may use those public funds to meet their general educational expenses.

use of its state funds. But, if an institution's imposition of religious qualifications on scholarship awards constitutes a sectarian use of public funds allocated to scholarships, the prohibition against sectarian use of those funds in the Maryland program would bar such an institution from using its grants for scholarships.

Finally, appellants contend that the administrative machinery is ineffective to prevent a sectarian use of funds awarded to the appellee colleges. But that contention is based solely on appellants' perception of what constitutes effective enforcement and not on the practical or constitutional considerations that are controlling. The appellants, for example, are disturbed because special inquiries would not be made if the Maryland Council learned that a grant was being used in part to pay the salary of a faculty member who happened to be a clergyman. But the Maryland Council does not sacrifice effective enforcement if it does not share appellants' biased distrust of the professional competence of academicians who also happen to be clergymen. Indeed, the several enforcement procedures that appellants suggest are constitutionally mandated but lacking would be necessary only if the Maryland Council shared their inbred suspicion of the academic integrity of the educational processes at the appellee colleges. But the Maryland Council's expert knowledge of the appellee colleges, reinforced by the essentially secular educational programs conducted by those institutions, makes clear that those suspicions are completely unfounded. For that reason, the enforcement machinery for administering the Maryland program has been structured to comport with the realities of the educational processes at the appellee colleges and the constitutional admonition against excessive government entanglement with the religious affairs of church-related institutions. The

findings entered by the court below clearly establish that the Maryland program contains sufficient prohibitions, and adequate machinery to enforce those prohibitions, to assure that grants awarded the appellee colleges will not advance religion. The Establishment Clause demands nothing more.

2. Classroom Prayers

Appellants cite the familiar cases of *Engel* v. *Vitale,* 370 U.S. 421 (1962), and *Abington School Dist.* v. *Schempp,* 374 U.S. 203 (1963), for the undisputed proposition that government cannot conduct prayers or devotional bible reading in public schools. Appellants' Brief, pp. 57-61. Appellants rely on that proposition to support their argument that government is barred from providing funds to any institution at which prayers are recited in the classroom. *Id.* at 61-63. Because a few faculty members at the appellee colleges start some classes with a prayer, appellants contend that aid to those colleges necessarily has the primary effect of advancing religion. That argument lacks any evidentiary or legal substance.

In the first place, appellants' argument rests on a fallacious assumption—namely, that the state is "financing religious worship" when it provides funds to a college at which prayers are recited in some classrooms. *Id.* at p. 62. There is no evidence in this record of this case, and none cited by the appellants, to show that any funds awarded under the Maryland aid program have been used to finance classroom prayers. Any such use of those funds is absolutely prohibited. Thus, there is no evidentiary basis for the appellants' argument.

Of greater significance are the invidious implications of that argument, which proceeds on an unstated premise—namely, that the mere receipt of public funds by private colleges transforms their actions into state action and subjects them to the same restraints that government must observe in the operation of public schools. In effect, appellants contend that private colleges receiving public funds must behave in all respects like public colleges or be forever barred from sharing in public educational programs. Because the serious financial plight of private colleges makes some public aid essential to their survival, appellants would require that all distinctions between private and public colleges be obliterated or would relegate the private sector of higher education to certain extinction. No decision of this Court requires that drastic result.

The *Engel* and *Schempp* decisions are simply irrelevant to any issue in this case. Those cases dealt solely with Establishment Clause limitations on governmental power in the operation of *public* schools. The First Amendment, like the Fourteenth Amendment, restrains only governmental action and its provisions cannot reach purely private action. There are only two narrowly circumscribed circumstances in which apparently private action is subject to the restraints of the First and Fourteenth Amendments. The first is when a private entity is performing an essentially governmental function. *E.g., Evans* v. *Newton,* 382 U.S. 296 (1966); *Marsh* v. *Alabama,* 326 U.S. 501 (1946). The second is when government is so deeply involved in the activities of a private entity that the private entity could not continue to function without governmental sanction. *E. g., Moose Lodge* v. *Ivis,* 407 U.S. 163 (1972); *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961). But no case has ever held that the mere receipt of public funds by a private entity is sufficient to transform its actions into

state action subject to the restraints of the First and Fourteenth Amendments. Yet, appellants' argument based on the classroom prayer practices of the appellee colleges requires such a holding.

Finally, appellants attempt to obscure the scope of the classroom prayer practice at these appellee colleges. The court below explicitly found that, "[at] Loyola and Mount Saint Mary's, the percentage of classes which start with a prayer is miniscule." J.S. App., p. A-38. It further found that appellants "failed to establish that beginning a class with prayer in any way diminishes the atmosphere of intellectual freedom which marks these colleges." *Id.* at pp. A-39 to A-40. And, as already noted, appellants have been unable to cite any evidence to show that either college used any portion of its state grants to finance the classroom prayer practice. It should also be noted that neither of these appellees has any institutional policy with respect to encouraging classroom prayers. J.S. App., p. A-39. To the extent that a very few faculty members engage in that practice, "[i]t is treated as a facet of the instructor's academic freedom." *Id.* Thus, even if appellants' argument had some legal support, there would be no evidentiary basis for concluding that aid to these colleges has the primary effect of advancing religion solely because a miniscule number of classes start with a prayer.

3. Religious Discrimination in Admissions and Hiring

Appellants assert as though it were an established and undisputed fact that the appellee colleges have *de facto* religious restrictions on student admissions and practice religious discrimination in faculty hiring. Both assertions directly contradict the explicit findings of fact by the court below on those two issues.

Appellants appear to suggest that the court below somehow overlocked their argument on *de facto* religious restrictions on admissions and the evidence that purportedly supports it. That is simply not the case. The court below specifically stated that "*thorough analysis of the student admission and recruiting criteria* demonstrates that the student bodies are chosen without regard to religion." J.S. App., p. A-44. Since appellants' argument of *de facto* religious restrictions on admissions focuses on the recruiting practices of the appellee colleges, it is obvious that the court below considered and rejected that argument. Indeed the evidence cited in appellants' brief to support that argument is identical to the evidence they attempted to marshall in the court below to support an identical argument.

Similarly, the court below found that appellants failed to produce any evidence to show that religious considerations enter the faculty hiring decisions at the appellee colleges. J.S. App., p. A-41. Nevertheless, appellants persist in contending that "[t]hree appellees have the policy or practice of at least partially restricting faculty appointments based on religion." Appellants' Brief, pp. 64-65. That contention will not withstand analysis.

First, it should be noted that, with respect to these appellees, the charge of religious discrimination is made only against Loyola College. No such claim is made with respect to Mount Saint Mary's College and none could in light of the express finding that "[a]t . . . Mount Saint Mary's, no inquiry is made into an applicant's religion." J.S. App., p. A-40.

The allegations of religious discrimination made against Loyola are based on the college's policy of seeking to attract academically qualified members of two religious orders to its faculty. Appellants' Brief, pp. 65-66. Loyola College does not dispute that such a policy exists. Loyola does, however, dispute the inference that appellants seek to draw from that policy—namely, that it imposes religious restrictions on hiring. Appellants can point to no evidence showing that a qualified lay person, no matter what his or her religion, has been rejected for a faculty position because of that policy. Indeed, the evidence contradicts any such inference. Appellants note, for example, that Loyola would like to have two Jesuits in its Philosophy Department. *Id.* at p. 66. The chariman of that department, however, testified unequivocally that he will hire no person because he is a Jesuit. His sole hiring criteria is academic competence. Tr. 1407-08. He also noted that he had hired no Jesuits during his tenure as department chairman. Tr. 1404-05. Moreover, the evidence clearly establishes that members of religious orders who apply for faculty positions at Loyola must compete with lay persons and that hiring decisions are based solely on academic competence. Tr. 1275-86.

Thus, the charges of religious discrimination leveled by appellants at these appellees find support only in appellants' myopic and highly selective reading of the evidence. Those charges are totally refuted by the findings of fact entered by the court below.

4. Appellants' Other Primary Effect Arguments

Appellants' other primary effect arguments are based on their characterizations of how theology is taught at the appellee colleges and the totally unsupported

assertion that the appellee colleges are "sectarian institutions." As this brief has already demonstrated,[80] appellants' claim that these appellees teach theology in a sectarian fashion rests on isolated pieces of testimony wrenched from their evidentiary context. The court below specifically refrained from making any finding that theology is taught at the appellee colleges in a sectarian fashion, J.S. App., p. A-50 n.9, and appellants have failed to marshall any credible evidence to support the finding that the court below refused to make. Moreover, the court below has construed the sectarian use restriction in the Maryland program in a manner that prohibits recipient colleges from using grant funds to support their theology or religion departments. *Id.* at pp. A-12 to A-13. Therefore, there is no longer even a possibility that public funds will support the teaching of theology at the appellee colleges.

Appellants' claim that the appellee colleges are "sectarian institutions" ineligible to receive public funds is based on a bald assertion without any semblance of evidentiary support. Appellants' Brief, pp. 74-75. The total answer to that assertion is the conclusion of the court below that the appellee colleges "conform closely to the colleges approved in *Tilton* v. *Richardson.*" J.S. App., pp. A-10 to A-11. Since the *Tilton* colleges were ruled eligible to receive public funds, colleges with the same characteristics obviously cannot be ineligible sectarian institutions.

C. Facial Unconstitutionality

Appellants alleged in their complaint that the authorizing legislation for the Maryland aid program is unconstitutional both on its face and as applied. J.A.

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[80] See pp. 61-63, *supra*.

9. Appellants draw no such distinction in their brief. They conclude their discussion of each of the constitutional defects they perceive in the Maryland program with the assertion that the challenged statute is unconstitutional. *E.g.,* Appellants' Brief, pp. 48, 57, 63. Appellants are clearly asking this Court to strike down the entire Maryland program if it agrees with any of their arguments. No such relief can be justified in this case.

The appellants' arguments are premised on their allegations that one or more of the appellee colleges engage in practices that render aid to them constitutionally invalid. But the appellee colleges are not the sole beneficiaries of the Maryland aid program. Grants under the program have been awarded to 18 colleges and universities. J.S. App., p. A-37 n.2. No question has been raised in this appeal concerning the eligibility of institutions not parties to the appeal to continue receiving public funds. Thus, there can be no justification for striking down the entire aid program on the basis of isolated practices at one or more of the appellee institutions.

Moreover, the Maryland General Assembly anticipated that particular grants might be ruled invalid or that particular colleges might be held legally ineligible to receive grants. To guard against that possibility, the General Assembly included in the authorizing legislation a severability clause which provides:

> "If any parts of this subtitle, or any particular payments or payments to any particular types of institutions pursuant to this subtitle, shall be held to be unconstitutional or invalid for any reason, such unconstitutionality or invalidity shall not affect the remaining parts of this subtitle, and shall not affect any other payments or payments to any other types of institutions pursuant to this subtitle, the General Assembly hereby declaring that it would have enacted the remaining parts of this subtitle or would have authorized the remaining payments or payments to remaining types of institutions, if such unconstitutionality or invalidity had been known; and to this end, all parts, sections, and parts of sections of this subtitle, and all administrative actions pursuant to this subtitle, are declared to be severable." J.A. 14-15.

This court's decisions make clear that such severability provisions must be respected as long as the portions of the statute that are invalidated do not defeat the legislative purpose in enacting the statute. *E.g., Champlin Rfg. Co.* v. *Commission,* 286 U.S. 210, 234 (1932); see *Sloan* v. *Lemon,* 413 U.S. 825, 833-34 (1973). That same principle applies even in the absence of a severability clause. *Tilton* v. *Richardson, supra,* 403 U.S. at 682-84.

In the context of this case, this Court would be justified in striking down the entire Maryland aid program only if a "substantial majority" of the colleges benefiting from the aid were constitutionally ineligible to receive public funds. *Sloan* v. *Lemon, supra,* 413 U.S. at 833-34. Since the eligibility for public aid of a "substantial majority" of the colleges benefiting from this aid program is unchallenged, the severability clause must be respected and the appellants must be denied the declaration of facial unconstitutionality they seek.

The distinctions that must be drawn between the appellee colleges and the non-party institutions must also be drawn among the appellee colleges. A practice or practices that may render one appellee college ineligible for public aid cannot be the basis for denying

aid to the other appellees that do not engage in such a practice or such practices. For example, appellants claim that three of the appellee colleges practice religious discrimination in hiring. Assuming, *arguendo,* that those claims are supported by the record and that such a practice is sufficient to render a college ineligible for public aid, the eligibility status of only those three colleges would be affected.[61]

A similar analysis is required with respect to appellants' entanglement argument. If the Court concludes that one of the appellee colleges has such a pervasive religious character that administrative supervision of aid to that college would create the risk of excessive entanglement, the only appropriate remedy would be to declare that college ineligible to participate in the aid program. Neither the eligibility of the other appellee colleges for aid nor the facial validity of the statute should be affected by such a ruling.

By seeking a declaration of facial unconstitutionality in this appeal, appellants are asking this Court to approach the case with a meat axe rather than the scalpel that is required in First Amendment adjudication. The *Tilton* decision clearly requires that the eligibility of each college be evaluated separately, 403 U.S. at 682, and that severability clauses be respected.

IV.

REPAYMENT OF GRANT FUNDS

In addition to the injunctive relief they seek, appellants ask this Court to order the appellee colleges to repay to the state all grant funds awarded them since

[61] That precise approach was taken by the district court in *Americans United* v. *Bubb,* 379 F. Supp. 872 (D. Kan. 1974).

this litigation was initiated.[62] Appellants recognize, as they must, that the repayment issue is governed by the decision in *Lemon* v. *Kurtzman,* 411 U.S. 192 (1973) (*Lemon II*), and the equitable principles it enunciated. The Court observed in *Lemon II* that, "in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is equitable." 411 U.S. at 200. These appellees submit that ordering repayment of the grant funds they have received is not necessary to preserve the constitutional principles at issue in this case and would be neither fair nor equitable.

In *Lemon II,* this Court permitted the Pennsylvania parochial schools to receive payment of some $24 million in public funds *after* it had ruled the Pennsylvania aid program unconstitutional. At the heart of that ruling was the Court's reluctance to have the validity of state action turn on subsequent federal court rulings.

> "Appellants ask, in effect, that we hold those charged with executing state legislative directives to the peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is constitutional. Appellants

[62] The grants appellants want to have repaid are described as "all payments not enjoined upon timely filed motions or applications." Appellants' Brief, p. 76. Excluded from the relief appellants seek, therefore, are the grants paid the appellee colleges in the first year of the Maryland program's operation. Those grants were paid before appellants initiated this litigation and were not subject to "timely filed motions or applications." The court below ruled that those grants need not be repaid even though it also found that those grants were paid at a time when the Maryland program was unconstitutional on its face. J.S. App., pp. A-23 to A-25.

> would have state officials stay their hands until newly enacted state programs are 'ratified' by the federal courts, or risk draconian, retrospective decrees should the legislation fall. In our view, appellants' position could seriously undermine the initiative of state legislators and executive officials alike." 411 U.S. at 207-08.

Those policy considerations, reinforced by the equitable principles applied in *Lemon II,* require that appellants be denied the repayment relief they seek.

The repayment issue in this case is distinguishable from the question decided in *Lemon II* in only one respect. The Court noted in that case that the appellants had not sought injunctive relief pending appeal even though the Pennsylvania aid program continued to operate while the appeal was pending. 411 U.S. at 196-97. Here, appellants sought and were denied an injunction pending appeal by the district court and by this Court after the favorable ruling below and after the state announced its intention to pay escrowed grant funds to the appellee colleges. But that distinction is not determinative.

The decision in *Lemon II* suggests three factors are controlling in determining whether repayment should be ordered in this case. First, would any constitutional evils that this Court perceives in the Maryland program accrue if repayment is not ordered? See 411 U.S. at 201-03. Second, have the appellee colleges relied to their detriment on their right to receive and spend the grant funds now challenged? See 411 U.S. at 203-06. Third, should any ruling of unconstitutionality by this Court have been clearly foreshadowed so that the state could be considered to have acted in bad faith in paying grant funds to the appellee colleges pending appeal? See 411 U.S. at 206-07.

Repayment can be ordered, of course, only if this Court concludes that the Maryland aid program fails to satisfy the primary effect or excessive entanglement branches of the governing Establishment Clause test. Failure to order repayment will not threaten any constitutional values embodied in that test. The primary effect doctrine seeks to prevent the use of public funds for religious purposes. Continued administrative supervision of the use of grant funds by the appellee colleges while this appeal is pending substantially reduces, if not eliminates, the risk of any religious use of those funds. Similarly, the risk of excessive entanglement will be eliminated by any ruling of unconstitutionality by this Court. All administrative supervision of grants already paid will have been completed by the time this Court rules, and its holding of unconstitutionality will foreclose any arguably invalid state involvement with the appellee colleges in the future.

There can be no question that the appellee colleges have relied to their detriment on their right to receive and spend the grants at issue. The evidence clearly establishes that private colleges and universities face serious financial problems and that the challenged aid program was designed to alleviate those problems. J.S. App., pp. A-37 to A-38. But, because they were named as defendants in this litigation, the appellee colleges were forced to forego public aid for almost three years. Payment was made to them only after the court below ruled that the aid program was constitutional and after the court below and this Court denied injunctions against that payment pending appeal. Under those circumstances, the appellee colleges were entitled to rely on their right to spend the ac-

cumulated grant funds on their pressing educational needs without the risk of repayment, especially since the court below had ruled that they need not repay grants they had received while the aid program was unconstitutional. J.S. App., pp. A-23 to A-25.

Finally, any ruling of unconstitutionality will not have been foreshadowed by any prior decisions of this Court. The decisions in *Tilton* v. *Richardson, supra,* and *Hunt* v. *McNair, supra,* suggest that any such ruling will be a departure from prior decisions. The sharp constitutional line that recent Establishment Clause decisions have drawn between aid to the higher and lower levels of church-related education can fairly be read to have created a presumption of validity for programs of aid to private higher education. Moreover, the state officials here voluntarily withheld payments from the appellee colleges until the court below applied *Tilton* and *Hunt* to this case and found that the appellee colleges closely conformed to the colleges ruled eligible for public funds in *Tilton.*

These considerations clearly demonstrate that repayment of grant funds by the appellee colleges is not necessary to preserving constitutional values and would not be fair and equitable. The only countervailing consideration that appellants can offer is their assertion that repayment is the "only effective redress" for the violation of constitutional rights they perceive. Appellants' Brief, p. 79. Even if it is assumed that payment of public funds to the appellee colleges has offended constitutional principles, that intangible harm to appellants hardly rises to the level of the tangible financial damage the appellee colleges will suffer by repayment. The injunctive relief appellants seek is more than sufficient redress for the constitutional rights they seek to vindicate. Thus, even if this Court rules that the Maryland aid program is constitutionally defective, the balance of equities requires that appellants be denied the repayment relief they seek.

Appellants contend, however, that failure to order repayment in this case will encourage states to enact and implement aid programs of "dubious constitutionality." *Id.* at p. 80. That hypothetical fear finds no support in the record of this case. The state officials here voluntarily withheld all payments to the appellee colleges after this litigation began. They announced their intention to make payment of accumulated grants only after the court below ruled the Maryland program was constitutional, and payment was not made until the court below and this Court denied injunctions pending appeal. Their actions reflect a greater degree of caution than *Lemon II* required. But, as was true in *Lemon II,* "this is not a case where it could be said that appellees acted in bad faith or that they relied on a plainly unlawful statute." 411 U.S. at 207.

CONCLUSION

For the several reasons stated above, appellants' constitutional claims are without merit. The judgment of the District Court should be affirmed and the appellants should be denied all relief.

Respectfully submitted,

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